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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO, (the Union), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on July 19, 1973 (*infra*, p. 72a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 481 F.2d 1018 (*infra*, pp. 58a-71a). The opinion of the National Labor Relations Board is reported at 195 NLRB No. 42 (*infra*, pp. 1a-58a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1973 (*infra*, p. 72a). On October 5, 1973, Mr. Chief Justice Warren E. Burger entered an order extending the time within which to file a petition for a writ of certiorari to December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Act protects an employee and her fellow-employees who are her union representatives from discharge or other discipline by their employer where (1) the employer discharges the employee because she declines to submit to questioning by her employer which she reasonably believes may lead to disciplinary action against her unless she is accompanied by and has the assistance of her union representative at the interview, and (2) the employer suspends one union representative, and suspends and later discharges another union representative, because they seek to furnish the representation asked of them by their fellow-employee.

STATUTE INVOLVED

Section 7 of the National Labor Relations Act (29 U.S.C. § 151) accords employees *inter alia* "the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7"; section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in . . .

employment to encourage or discourage membership in any labor organization. . . ."; and section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ."

STATEMENT

I. The Findings

The findings of the National Labor Relations Board, affirmed by the Court of Appeals, may be summarized as follows:

Quality Manufacturing Company (the Company) is engaged in the manufacture of women's clothing (A. 14, 34; *infra*, pp. 2a, 19a). Its owners and principal officers are Lawrence Gerlach, Sr., president; Mary Kathryn Gerlach, his wife and production manager; and Lawrence Gerlach, Jr., their son and general manager (A. 14-15; *infra*, pp. 2a, 59a). The Union since 1968 has been the certified collective bargaining representative of the Company's production employees (A. 35; *infra*, pp. 20a, 59a). The agreement between the Company and the Union provides that "[t]here shall be a Shop Chairlady . . . selected by or under the auspices of the Union" (A. 461). In 1969 Delila Mulford was the Shop Chairlady (A. 37; *infra*, pp. 23a, 59a); Martha Cochran was Assistant Shop Chairlady and Secretary-Treasurer of the Union (A. 35; *infra*, pp. 20a, 60a); and Catherine King was a long-time employee of the Company (A. 15; *infra*, pp. 2a, 59a).

On October 16, 1969, the Company discharged Catherine King because she had refused to attend a conference at the Company's request without union representation in circumstances where she "had

reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (A. 17, 21, 63; *infra,* pp. 4a, 7a, 24a). On October 12, 1969, the Company had suspended shop chairlady Delila Mulford for two days, and on October 16, 1969, the Company discharged her, for her persistence "in seeking to represent King at the conference . . . [which the Company] requested" (A. 15, 17, 21-22, 58, 60; *infra,* pp. 3a, 4a, 8a, 23a-24a). On October 14, 1969, the Company had suspended assistant shop chairlady Martha Cochran for two days for the same reason (A. 16-17, 21-22, 52; *infra,* pp. 3a-4a, 8a, 21a). On October 16, 1969, the Company discharged Martha Cochran for "filing grievances on behalf of herself, Mulford, and King" (A. 17-18, 22, 56; *infra,* pp. 4a, 9a, 22a).

The events which culminated in the suspensions and discharges began on the morning of Friday, October 10, 1969. On that morning shop chairlady Delila Mulford, employee Catherine King, and two other employees met with all three Gerlachs. At the meeting the employees complained that they could not make a satisfactory wage under the piece work system then in effect. The discussion ended with Gerlach, Jr., ordering Mulford to return to her work station and telling her "if [the employees] didn't like the way it was there in the company to go elsewhere." (A. 15, 38; *infra,* pp. 2a, 23a, 59a.)

Later the same day, while on the production floor, Mrs. Gerlach noticed that King had shut down her machine, and was waving her arms and gesturing, causing some minor disturbance. Two other employees had stopped their machines and were watching King. Mrs. Gerlach directed King to resume production, but

King told her to "tend to your business." Thereupon Mrs. Gerlach ordered King to go to Mr. Gerlach's office. King did, but on her way to the office she asked shop chairlady Mulford to accompany her. Mrs. Gerlach warned Mulford that she "had no business down there," but Mulford left her work station and accompanied King to the anteroom of Mr. Gerlach's office. Mrs. Gerlach informed her husband of what had transpired. Mr. Gerlach told Mulford to return to her work station because "it wasn't a grievance and [they] didn't have any business with her." Mulford refused, replying that "Catherine paid her dues and she was entitled to [have me] be there," to which the Gerlachs rejoined that Mulford "was endangering . . . [her] job. . . ." Mr. Gerlach ordered King to come into his office for a discussion but King replied that she would not without Mulford. Gerlach then told both King and Mulford to return to their work stations. They did. On Sunday, October 12, Gerlach telephoned Mulford and informed her that she was suspended for two days. He gave no reason, but Mulford understood that it was because of her conduct in seeking to represent King on the previous Friday, as it was. (A. 15-16, 38, 148; *infra,* pp. 2a-3a, 23a-24a, 59a-60a.)

The following Monday, October 13, King found upon reporting for work that her time card was not in the rack, indicating under plant practice that she was wanted in Mr. Gerlach's office. This time King asked Martha Cochran, the assistant shop chairlady, to accompany and represent her. Cochran went with King without first "punching in" on her own time card. They met Mrs. Gerlach outside the office. She warned Cochran that "your time card is upstairs and my advice to you is to go upstairs and go to work if you want your job." She added that the Gerlachs

wanted to talk only to King and "take up where we left off Friday." Cochran replied, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is union business and she has asked me to represent her," stating further that she was a union steward and that was her duty. Cochran and King then spoke to Mr. Gerlach and asked him if he was going to give King her time card. He said that he would not until King came into his office and talked to him in private. Cochran and King declined to accede to the request for an interview with King without union representation. They sat and waited in or near the office for the remainder of the day. In the meantime Cochran's card was also "pulled" from the rack. (A. 16, 35-36; *infra,* pp. 2a-3a, 20a-21a, 60a-61a.)

The next morning, Tuesday October 14, Cochran and King again went to Gerlach's office. They asked him if he was going to return King's time card. Gerlach again replied that he would not until King talked to him in private. Cochran asked about her own card. She was informed that she had been suspended for two days for being away from her work station the day before. King and Cochran left the plant. (A. 16-17, 36; *infra,* pp. 3a-4a, 21a, 61a.)

The next day, Wednesday October 15, Mulford's two-day suspension ended. She went to Gerlach's office together with Cochran and King. They were met by the Gerlachs. Mulford inquired as to the status of Cochran and King. Mr. Gerlach replied that Cochran was still under suspension for another day and that he would not give King her time card until she came into the office and talked to him in private. Cochran and King left. Mulford went to work. (A. 17, 36, 38-39; *infra,* pp. 4a, 24a, 61a.)

The following day, Thursday October 16, Cochran's two-day suspension expired. She, Mulford and King went to the office and were again met by the Gerlachs. Mrs. Gerlach gave Cochran her time card and she went to work. Mrs. Gerlach then told King that Mr. Gerlach wanted to see her in the office alone. King asked, "With Delila [Mulford]?" Mr. Gerlach said, "No, not with Delila." He added that if King "went out the door"—that is, again declined to participate in a private interview—"she was finished." King walked out. Mulford then asked if she could go to work. Gerlach replied, "No. You've abandoned your job. You're finished." (A. 17, 39; *infra,* pp. 4a, 24a, 61a.)

During the noon hour of the same day, October 16, Cochran went to the office of Gerlach, Jr., and sought to present written grievances to him on behalf of Mulford, King, and herself. Gerlach, Jr., told her that he did not have time "to fool with them damn things. . . . I'm leaving town." Cochran laid the grievances on his desk but Gerlach picked them up and threw them in the trash. He then walked into the work area, pulled Cochran's time card, and told her, "you worked this morning, but you're not working this afternoon." Cochran went to the office of Gerlach, Sr., and asked if she had been fired. He responded, "Just go home. You wanted to draw unemployment now go on and draw it." Cochran left the plant. Later that day Cochran telephoned Gerlach's secretary and asked whether Gerlach wanted her to report for work the next day. The secretary told her, "He said no." Cochran asked the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran was never notified to come back to work. (A. 18, 37, 129; *infra,* pp. 4a, 22a, 61a-62a.)

II. The Board's Conclusions and Order

The Board's conclusions divide into three related parts.

1. The Board found that on October 16, 1969, the Company discharged Catherine King because she had refused to attend an interview at its request without union representation in circumstances where she "had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (A. 17, 21; *infra,* pp. 4a, 7a). This finding confronted the Board with the need to address the question of whether or not statutory protection is available in "a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview" in which the risk of discipline to the to-be-interviewed employee reasonably existed (A. 18; *infra,* p. 5a). The Board concluded that in such a situation "it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action" (A. 19; *infra,* p. 6a). The Board explained that the employer was free to forego the interview if he was unwilling to conduct the interview with the union representative present, but that the employer was not free to coerce the employee's unrepresented attendance. The Board stated the rationale in support of its conclusion as follows (A. 19-20; *infra,* pp. 6a-7a):

> This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.
>
> This seems to us to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses.

The Board limited the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee has "reasonable grounds to fear" that the outcome of the interview may adversely affect his employment status (A. 20 and n. 3; *infra,* p. 6a and n. 3). This qualification meshes the employee's lack of need for protection where cause for apprehension does not reasonably exist with the employer's interest in operational flexibility. As the Board stated, "We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative" (A. 20-21; *infra,* p. 7a). The Board later explicitly confined the employee's right to be free of coerced attendance at an interview with-

out union representation to the situation where the employee requests representation.[1] Finally, the Board adhered to its settled position distinguishing between an investigatory interview and a disciplinary interview. The Board found that the requested interview in this case was investigatory, and pointed out that, (1) as here, at an investigatory interview of an employee, which is fact-gathering in purpose, the employer has the option not to meet with the union representative so long as he chooses to forego the interview, while (2) at a disciplinary interview of an employee, where the employee is to be disciplined or the decision to discipline him is to be made, the employer has an indefeasible statutory bargaining obligation to meet with the union representative (A. 18; *infra,* p. 5a).[2]

Accordingly, one member dissenting, the Board concluded that "King had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct. Under these circumstances King reasonably requested union representation. It is also clear that . . . [the Company] discharged King for insisting on this right. Therefore, we conclude that King's discharge was in violation of Section 8(a)(1)" (A. 21; *infra,* pp. 7a-8a).

2. The Board found that the Company suspended shop chairlady Delila Mulford and assistant shop chairlady Martha Cochran "for performing their duties as union chairladies in seeking to represent King

[1] *Mobil Oil Corporation,* 196 NLRB No. 144, 80 LRRM 1188, 1191, n. 2 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973).

[2] Cf., *Texaco, Inc.,* 168 NLRB 361 (1967), enforcement denied, 408 F.2d 142 (C.A. 5, 1969), with *Jacobe-Pearson Ford,* 172 NLRB 594 (1968).

. . .", and later discharged Mulford for "insisting on representing King" (A. 21-22; *infra,* p. 8a). Accordingly, one member dissenting, the Board concluded that, as the conduct constituted "protected concerted activity," the suspensions and discharge "violated Section 8(a)(1) of the Act" (A. 22; *infra,* pp. 8a-9a).

3. The Board unanimously concluded that the Company "discharged Cochran because she sought to engage in a protected concerted union activity, filing grievances on behalf of herself, Mulford, and King. Thus her discharge was in violation of Section 8(a)(3) and (1) of the Act" (A. 22; *infra,* p. 9a).

The order entered by the Board precisely encases its conclusions. As to coerced participation of an employee in an interview without union representation, the Board ordered the Company to refrain from (A. 23; *infra,* pp. 9a-10a):

> Disciplining any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.
>
> * * *
>
> Requiring, under threat of discipline, that any employee take part in an interview or meeting without union representation, where such representation has been requested by the employee and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

As to the efforts of the union representatives to furnish their fellow-employee with the representation

asked of them, the Board ordered the Company to refrain from (A. 23; *infra,* p. 10a):

> Discriminating against union chairladies for seeking to represent employees at any meeting held with an employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action and the employee has requested such representation.

As to the presentation of a grievance by a union representative, the Board ordered the Company to refrain from (A. 24; *infra,* p. 10a):

> Discriminating against union chairladies for seeking to file grievances.

Finally, the Board ordered the Company to offer reinstatement to King, Mulford and Cochran, and to make them whole for any loss of earnings sustained by them because of their suspensions and discharges (A. 72; *infra,* p. 55a).

III. The Decision of the Court of Appeals

The Court of Appeals enforced that part of the Board's order pertaining to the discharge of Cochran for "filing grievances on behalf of herself, Mulford, and King" (*infra,* p. 62a). But it denied enforcement of the remainder of the order on the ground that "King had no right to have a union representative present at the requested meetings with her employer . . ." (*infra,* p. 62a). It based its conclusion virtually wholly on its reading of precedent (*infra,* pp. 63a-70a). In its view, while there is "no doubt that employees have a right to union representation after a grievance has been filed," the "issue here is whether that right may be extended under the Act to require employers to permit an employee to have union representation at interviews . . .

whenever the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation" (*infra,* p. 68a, n. 1). According to the Court of Appeals, prohibition of coerced attendance at such an interview rests on a "new theory as to the meaning and application of the Act, and the extent of employees' rights thereunder," and implicates the Board in an impermissible assertion of "power to alter or rearrange employer-employee relations to suit its every whim" (*infra,* p. 70a).

On July 17, 1973, two days before the decision of the Court of Appeals in this case, the Court of Appeals for the Seventh Circuit reached a like conclusion upon the same question.[3] In its view, while the right to bargain for and to exert economic pressure to secure union representation at an investigatory interview by contract "is plainly guaranteed by § 7 of the Act" (482 F.2d at 845), the statute does not by its own force confer the right to union representation, for the "requested Union representation at an investigatory interview is clearly not the kind of 'concerted activity' with which § 7 is primarily concerned" (*id.* at 847). Why it is not is unexplained. The court simply relied on its perception of "precedent" and its unparticularized version of "history" (*id.* at 847-848). It was moved to its conclusion by apparent reluctance to embrace what it believed to be a "novel . . . interpretation" which, as it saw it, "would have been recognized many years ago" were it valid (*ibid.*).

On October 9, 1973, the Court of Appeals for the Fifth Circuit joined the Fourth and Seventh Circuits

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[3] *Mobil Corporation* v. *N.L.R.B.*, 482 F.2d 842 (C.A. 7, 1973).

in rejecting the Board's conclusion.[4] Like the other courts of appeals, it rested its view on its perception of precedent (84 LRRM at 2438), opining without analysis "that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (*id.* at 2439).

REASONS FOR GRANTING THE WRIT

1. Whether the National Labor Relations Act protects an employee from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline is an important and recurrent question which this Court should decide.[5] The administration of discipline to

[4] *N.L.R.B.* v. *J. Weingarten*, 84 LRRM 2436 (C.A. 5, 1973).

[5] Its recurrence is patent. *Western Electric Co.*, 205 NLRB No. 46, 84 LRRM 1041 (1973); *New York Telephone Co.*, 203 NLRB No. 180, 83 LRRM 1353 (1973); *J. Weingarten, Inc.*, 202 NLRB No. 69, 82 LRRM 1559 (1973), enforcement denied, 84 LRRM 2436 (C.A. 5, 1973); *National Can Corp.*, 200 NLRB No. 156, 82 LRRM 1096 (1972); *Western Electric Co.*, 198 NLRB No. 82, 80 LRRM 1705 (1972); *Mobil Oil Corp.*, 196 NLRB No. 144, 80 LRRM 1188 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973); *Lafayette Radio Electronics*, 194 NLRB No. 77, 78 LRRM 1693 (1971); *Illinois Bell Tel. Co.*, 192 NLRB No. 138, 78 LRRM 1109 (1971); *United Aircraft Corp.*, 179 NLRB 935, 937-938, 968-969 (1969), affirmed, 440 F.2d 85, 88, 97-98 (C.A. 2, 1971) (merits of question not reached by NLRB or Court of Appeals); *Texaco Inc.*, 179 NLRB 976 (1969); *Wald Mfg. Co.*, 176 NLRB 839, 846 (1969), affirmed on proceedings not presenting this question, 426 F.2d 1328 (C.A. 6, 1970); *Dayton Typographic Service*, 176 NLRB 357 (1969); *Jacobe-Pearson Ford, Inc.*, 172 NLRB 594 (1968); *Chevron Oil Co.*, 168 NLRB 574 (1967); *Texaco, Inc.*, 168 NLRB 361 (1967), enforcement denied, 408 F.2d 142 (C.A. 5, 1969); *Electric Motors and Specialties*, 149 NLRB 1432, 1440 (1964); *Dobbs Houses*, 145 NLRB 1565, 1570-71 (1964); *Ross Gear and Tool Co.*, 63 NLRB 1012, 1033-34 (1945), enforcement denied, 158 F.2d 607, 611-614 (C.A. 7, 1947).

control on-the-job misconduct is a pervasive part of life in the industrial community. For the worker discharge because of a claimed infraction is economic capital punishment, and lesser discipline is simply less severe punishment which is different in the degree of injury but not in the quality of the worker's concern with it. For the employer discipline is necessary to the maintenance of order and responsible conduct essential to production. For both substantive and procedural fairness in the administration of discipline is indispensable. For the worker the need for protection against unjust punishment is self-evident. For the employer the need to refrain from unjust punishment is hardly less self-evident, for there is nothing more likely to wrack the industrial community to the detriment of the employer's self-interest in production and profitability than disciplinary unfairness. Determination of the role that the National Labor Relations Act plays in the administration of industrial discipline is therefore as important a question as can arise under this statute. If that role is as crabbed as the several courts of appeals believe, we need to know that. And if it is more hospitable and enfolding, as we believe it to be, we need to know that. In short, whatever the answer may be, the question requires definitive determination so that employers, workers, and the unions who represent them may know how to order their affairs.

2. All grant that at or after the imposition of discipline the employee is statutorily entitled to union rep-

resentation to contest it. The question then is whether the employee is entitled to union representation in the predecisional stage when the employer seeks to subject him to a compulsory interview preparatory to its determination of whether or not the employee merits discipline.

The employee's need for the protection of union representation is at least as exigent in the investigation of his conduct by inquiry of him before the decision is made as it is thereafter. For fright, inexperience, or ignorance may expose him to unmerited discipline which would be avoidable had he had the aid of knowledgeable union representation at his interview. And the employer himself might well reach a different decision if his own inquiry of the employee were informed by the competent contribution of the union representative. Furthermore, the purpose of an interview is not confined to confirming or establishing the existence or absence of blameworthy conduct. Questions in extenuation of the offense and of the appropriate extent of discipline also require exploration.

Accordingly, what happens at the interview is always significant, and often decisive, in determining whether or not discipline is merited and in assessing the appropriate degree of punishment. To require postponement of union representation until after the decision is reached is therefore to deny it at the critical predecisional stage which may for all practical purposes be conclusive of the outcome.

Compelling the employee's subjection to such an interview without the assistance of union representation cannot be squared with the National Labor Relations Act. For the employee is required to confront his employer alone and unaided when the entirety of the statute is premised on eliminating just such individual helplessness. Thus, the mischief which the Act identifies is the "inequality of bargaining power between employees . . . and employers . . ." (§ 1, 2d ¶); the end it seeks is "restoring equality of bargaining power between employers and employees" (§ 1, 3d ¶); and the means by which that goal is to be realized is through "protecting the exercise by workers of full freedom of association . . . and designation of representatives of their own choosing . . . for the purpose of . . . mutual aid or protection . . ." (§ 1, 5th ¶). The Act thus rests on the old insight that "[a] single employee was helpless in dealing with an employer", and that "[u]nion was essential to give laborers opportunity to deal on equality with their employer."[6] Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the "relative weakness of the isolated wage earner caught in the complex of modern industrialism . . . ."[7]

To require an employee to submit to an interview which may lead to his discipline without the aid of union representation is therefore to perpetuate the very inequality which the Act denounces and to bar protected recourse to the very means which the Act safeguards as the way to overcome that inequality. Accordingly, the Board perceptively reached to the heart of the Act in rejecting that basic contradiction (*Mobil Oil Corp.*, 196 NLRB No. 144, 80 LRRM 1188, 1191

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[6] *American Steel Foundries* v. *Tri-City C.T. Council*, 257 U.S. 184, 209 (1921).

[7] S. Rep. No. 573, 74th Cong., 1st Sess., 3 (1935).

(1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973)):

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

Inhospitality to this view simply reflects an attitude unattuned to the basic reach of this statute. Statutory solicitude for the employee easily embraces protecting him in his refusal to submit without union representation to an investigatory interview of his conduct in which the risk of discipline reasonably inheres. And the extent to which a contrary conclusion is alien to the Act is exemplified by the decisions cited by the Seventh Circuit to support the applicability in this case of the view that an activity may "not in fact [be] protected" though within the "literal reading of § 7 . . ." (482 F.2d at 846. For we are asked to look for guidance to such unprotected activity as mutiny (*Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S 31 (1942)), participation in a violent sitdown strike (*N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S 240 (1939)), engagement in a

breach-of-contract strike (*N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332 (1932), and disparagement of the employer's product in circumstances akin to physical sabotage (*N.L.R.B.* v. *Local No. 1229, I.B.E.W.*, 346 U.S. 464 (1953)) (482 F.2d at 846, n. 11). It is a measure of the infelicity of the understanding of this statute that these decisions should be invoked when the question at issue is whether an employer can coerce an employee's subjection to an interview without union representation in circumstances where the employee reasonably fears that he is exposed to the infliction of discipline.

3. Recognition that an employee has a statutory right to refuse to submit without union representation to an interview in which the risk of discipline reasonably inheres harmonizes with actual industrial practice. "An essential part of any investigation is to give the employee affected full opportunity to explain his actions."[8] But a full opportunity is significantly less than full if the employee is without the aid of union representation. Accordingly, "there is a well-established current of arbitral authority sustaining the right of such representation where the situation is such that the employee who is called in for interrogation has reasonable cause to anticipate that the interview will result in the development of information which will be utilized as the basis for disciplinary action against him."[9] The participation of the union representative in the interview does not convert it into an adversary contest but rather enhances its usefulness by increasing the likelihood of securing more accurate information and a more informed interchange of views

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[8] Slichter, Healy & Livernash, The Impact of Collective Bargaining on Management, 646 (1960).

[9] *Chevron Chemical Co.*, 60 LA 1066, 1071 (M.H. Merrill, 1973).

to the advantage of all (*Independent Lock Co.*, 30 LA 744, 746 (J. W. Murphy, 1958)):

> [Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising.... [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to bear on the problem.[10]

[10] See also, *Caterpillar Tractor Co.*, 44 LA 647, 651 (H.J. Dworkin, probably 1965):

> The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion.

Therefore, in general, the accepted view is that "an employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him."[11]

4. It is said that protection from coerced attendance without union representation at an interview in which the risk of discipline reasonably inheres is not conferred by the Act but can be secured only by contract for which the employees have a statutory right to bargain and strike (*supra*, p. 13). Confinement of protection to contract rests on *ipse dixit* alone. Union representation is in its essence concerted activity for mutual aid or protection; safeguarding the worker's refusal to confront his employer in an adverse situation without union representation is at the heart of the Act; and statutory protection in this situation harmonizes with actual industrial practice. The protection which the statute confers is of course often supplemented and refined by contract.[12] The substance of the statutory right may be enhanced by partic-

[11] *Universal Oil Products Co.*, 60 LA 832, 834 (B. M. Shieber, 1973). See also, *Allied Paper Co.*, 53 LA 226 (J. F. Holly, 1969); *Pick-N-Pay Supermarkets*, 52 LA 832 (R. W. Haughton, 1969); *Thrifty Drug Stores Co.*, 50 LA 1253, 1262 (C. A. Jones, 1968); *Waste King Universal Products Co.*, 46 LA 283, 286 (J. D. Petree, 1966); *Dallas Morning News*, 40 LA 619, 623-624 (M. H. Rohman, 1963); *The Arcrods Co.*, 39 LA 784, 788-789 (E. R. Teple, 1962); *Valley Iron Works*, 33 LA 769, 771 (A. Anderson, 1960); *Schlitz Brewing Co.*, 33 LA 57, 60 (F. Meyers, 1959); *Singer Mfg. Co.*, 28 LA 570 (S. L. Cahn, 1957); *Braniff Airways*, 27 LA 892 (J. S. Williams, 1957); *John Lucas & Co.*, 19 LA 344, 346-347 (T. J. Reynolds, 1952).

[12] Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col. L. Rev. 52, 66-80 (1957).

ularized contractual definition of its scope; realization of the statutory right may be furthered by contractual specification of the procedural means for asserting it; and incorporation of the statutory right into the contract performs the important function of eliminating debate as to its existence by the people on the factory floor who know their contract if not the law. Accordingly, the contract may facilitate vindication of the right, but it is the statute which creates it. Thus, discrimination because of union membership or nonmembership is prohibited by 40 percent of contracts,[13] but it can hardly be suggested that the right which the contract protects is therefore not statutory.

5. It is said that precedent belies the existence of the statutory right (*supra,* pp. 12-14). But such precedent as is in point is unpersuasive; much that is asserted as precedent is simply misunderstood; and the ossifying role which is assigned to precedent is fundamentally mistaken.

(a) Three decisions may be read as precedent adverse to the proposition that the Act protects an employee from coerced attendance without union representation at an interview with his employer which he reasonably fears may expose him to the risk of discipline. One is an obscure and cryptic 1947 decision of a court of appeals reversing a 1945 Board determination which is itself unclear and equivocal.[14] The other two are 1964 summary affirmances by the Board of trial examiners' decisions which are conclusory and

[13] Basic Patterns in Union Contracts, 95:2 (BNA, February 1971).

[14] *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F.2d 607, 611-614 (C.A. 7, 1947), setting aside, 63 NLRB 1012, 1033-34 (1945).

unreasoned.[15] The search for the right reading of a statute should not atrophy with the first judicial rejection of an administrative determination, nor with unexplained agency affirmances of two trial examiners' decisions.

(b) The second line of precedent, said to be contrary to the Board's interpretation, is simply misunderstood and is not adverse at all. The Board's settled position, adhered to in this case, distinguishes between an investigatory interview and a disciplinary interview: (*i*) as here, the Board found that the requested interview was investigatory, and at such a fact-gathering and exploratory interview, the employer has the option not to meet with the union representative so long as he chooses to forego the interview with the employee; (*ii*) in contrast, at a disciplinary interview of an employee, where the employee is to be disciplined or the decision to discipline him is to be made, the employer has an indefeasible statutory bargaining obligation to meet with the union representative (*supra,* p. 10). It is this distincton which is misinterpreted. It is argued that, since the employer's statutory obligation to meet with the union representative is confined to a disciplinary interview of the employee, it necessarily follows that the employer can coerce the unrepresented attendance of an employee at an investigatory interview of him. But the logic of this argument is quite obviously fallacious. That the statute does not compel the employer to meet with the union representative does not mean that the statute allows the employer to compel the employee's submission to an interview without the union representative. Rather,

[15] *Dobbs Houses*, 145 NLRB 1565, 1570 (1964); *Electric Motors and Specialties*, 149 NLRB 1432, 1440 (1964).

each has equivalent freedom, the employer the liberty not to meet with the union representative, and the employee the liberty not to meet without the union representative. For example, an employer may not discharge his unorganized employees who walk off the job in a body because he has ignored their complaint about the lack of heat in the plant. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962) Yet, since those same workers do not have a statutory bargaining representative, the employer is under no obligation to meet and confer about the cold in the plant. In short, an employer is not free to coerce his employees in their exercise of a right protected by section 7 simply because the employer is not under an additional statutory obligation to bargain. It is this simple and basic distinction that the Board has perceived but the courts miss. As the Board has stated, "while the employer's denial of . . , a request [by an employee to be represented by his union] may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence" (A. 19; *infra*, p. 6a).

(c) The role of precedent has in any event been fundamentally misconceived. Adjudication within the common law tradition is often tentative at the beginning, with some backing and filling as the scope of the problem is better appreciated under the impress of continuing exposure to different manifestations of it, and with the formulation of a definitive position necessarily deferred until the ripeness of time has

revealed in full dimension the considerations pertinent to the solution. This is especially true of the administrative process when it works well. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953) "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . , and has modified and reformed its standards on the basis of accumulating experience." *I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961). To freeze development in the name of precedent contradicts the genius of the process. " 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' " *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 255 (1970) (Stewart, J., concurring).

6. We do not know why the Board has not sought certiorari in this case. The question is important and recurrent. It has been amply considered at the administrative and judicial levels so that no further illumination can be expected from additional scrutiny. And judicial review, while adverse, has not disclosed any deficiency in the Board's rationale which might persuade it to recede from its position. Accordingly, as this Court noted on an earlier occasion, where the Court granted certiorari and unanimously reversed the decision below on the petition of the private party although

the Board had declined to seek certiorari, but for the private party's petition "the decision of the Government not to apply for certiorari . . . would have unnecessarily postponed resolution on that important issue." *International Union, United Automobile Workers* v. *Scofield,* 382 U.S. 205, 214 (1965). So here, the time for decision is now.

CONCLUSION

When all is said and done, the stark fact remains that an employer has discharged an employee, and suspended and discharged her fellow-employees who are her union representatives, for no cause other than insistence on union representation. Protection from this raw exercise of economic power to squelch the mutual aid which is at the heart of union representation is within the plain unsophisticated reach of the National Labor Relations Act. The petition should be granted.

Respectfully submitted,

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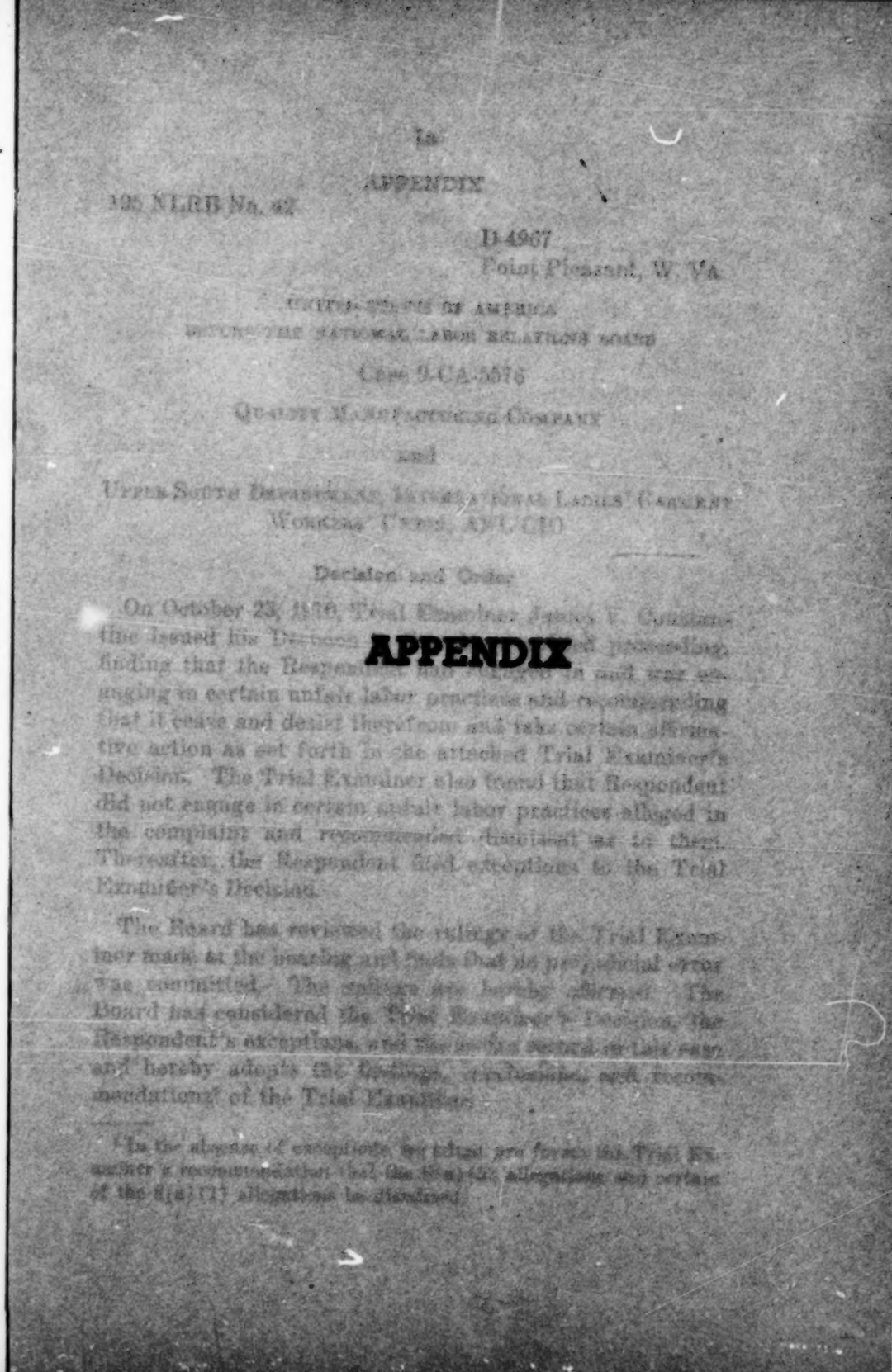

APPENDIX

195 NLRB No. 42

D-4967
Point Pleasant, W. Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-CA-5576

QUALITY MANUFACTURING COMPANY

and

UPPER SOUTH DEPARTMENT, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Decision and Order

On October 23, 1970, Trial Examiner James V. Constantine issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent did not engage in certain unfair labor practices alleged in the complaint and recommended dismissal as to them. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations[1] of the Trial Examiner.

[1] In the absence of exceptions, we adopt *pro forma* the Trial Examiner's recommendation that the 8(a)(5) allegations and certain of the 8(a)(1) allegations be dismissed.

The Trial Examiner finds that Respondent violated Section 8(a)(3) and (1) by suspending employee Delila Mulford and Martha Cochran and by discharging Mulford, Cochran, and employee Catherine King. We agree.

Respondent is engaged in the manufacture of women's clothing. Its owners and principal officers are Lawrence Gerlach, Sr., president; Mary Kathryn Gerlach, his wife and production manager; and Lawrence Gerlach, Jr., their son and general manager.

The events which culminated in the suspensions and discharges began on the morning of Friday, October 10, 1969. On that morning all three Gerlachs met with Mulford, the union chairlady, and with King and two other employees during which meeting the union representatives complained that the employees, including King, could not make a satisfactory wage under the piece rate then in effect. The meeting produced only an acrimonious exchange and ended when Mulford was ordered to return to her work station.

Later that same day, while on the production floor, Mrs. Gerlach observed that King had shut down her machine and was causing some minor disturbance. According to Mrs. Gerlach, two other employees had also stopped their machines and were watching King. Mrs. Gerlach directed King to resume production. King responded with a flippant remark challenging Mrs. Gerlach's authority. Mrs. Gerlach then directed King to go to Mr. Gerlach's office. King complied, but en route she asked Mulford, the union chairlady, to accompany her. Mulford left her own work station and went with King to the anteroom of Gerlach's office where Mrs. Gerlach told her husband what had transpired.

Gerlach told Mulford to return to her work station and Mulford refused. Gerlach then told King to come into his office for a discussion, and King replied that she would not go without Mulford. At that, Gerlach told King and Mulford to return to their work stations, and they did so.

On Sunday, October 12, Mrs. Gerlach telephoned Mulford and informed her that she was suspended for 2 days. No reason for the suspension was given, but Mulford understood that it was for her activities in seeking to represent King on the previous Friday.

On Monday, October 13, King reported to work. She found that her timecard was not in its usual place in the rack, indicating pursuant to plant practice that she was wanted in Gerlach's office. Before going to his office, however, King asked assistant chairlady Cochran to accompany, and represent, her. Cochran accompanied King without first punching in on her timecard.

At the office, they talked first to Mrs. Gerlach, who told Cochran that her card was in the rack and that she should go to work if she wanted her job. Mrs. Gerlach added that they (the Gerlachs) wanted to talk only to King. When asked why, she replied that they wanted to take up where they left off Friday. Cochran then said, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is Union business and she has asked me to represent her."

Cochran and King then saw Gerlach and asked if he was going to give King her timecard. He responded that he would not do so until King came into the office and talked to him in private. When Cochran declared that King wanted union representation, Gerlach responded that he would talk to them one at a time. Cochran and King declined and then sat and waited in or near the office the rest of the day. Mrs. Gerlach, meanwhile, "pulled" Cochran's timecard.[2]

On Tuesday morning, October 14, Cochran and King again went to the office and asked Gerlach if he was going to give King her timecard. Gerlach again replied that he

[2] As Cochran subsequently learned, this action was taken to effect a decision to suspend Cochran for 2 days.

would not until King came into the office and talked to him in private. When Cochran asked about her own card, Gerlach replied that she was suspended 2 days for being away from her machine the prior day. King and Cochran then left the plant.

The next day, October 15, Mulford's 2-day suspension expired and she returned to the plant along with Cochran and King. Again, they went to the office and spoke with Gerlach. He informed Cochran that she was still suspended for another day and reiterated that he would not give King her timecard until she came into the office and talked to him in private. Cochran and King left. Mulford was given her timecard and went to work.

On Thursday, October 16, Cochran, Mulford, and King were discharged. That morning, too, the three went to the office and were met by Mr. and Mrs. Gerlach. Cochran was given her timecard and went to work. Mrs. Gerlach then told King that Gerlach wanted to see King in the office. King asked, "With Delila (Mulford)?" Gerlach said, "No, not with Delila." He added that if King "went out the door," that is to say, again declined the interview, she would be discharged. King walked out.

Mulford then asked Gerlach if she could go to work. "No," he replied, "You've abandoned your job. You're finished." He told Mulford to leave, and she did.

During the noon hour that same day, Cochran went to the office of Gerlach, Jr., and presented to him written grievances on behalf of herself, Mulford, and King. Gerlach, Jr., refused to take the grievances, saying that he did not have time for them as he was leaving town. Cochran insisted and laid the grievances on his desk, whereupon he picked them up and threw them into the trash. When Cochran left Gerlach, Jr.'s office, he went up to the work area and pulled Cochran's timecard. Later in the day, the senior Gerlach confirmed the decision to discharge Cochran.

I. The Discharge of King

We turn first to the question whether Respondent violated Section 8(a)(1) and (3) of the Act by discharging King because she insisted on union representation at the meeting which Respondent demanded. We affirm the Trial Examiner's finding that the Act was violated.

The issue presented by King's discharge was not decided by either the Board or the court in *Texaco, Inc.*, 168 NLRB 361, enforcement denied 408 F.2d 142 (C.A. 5, 1969). The issue posed in *Texaco* was whether the employer violated its obligation to bargain with an employee representative by denying an employee's request that a union representative be present during an interview conducted for the purpose of perfecting a case against the employee. The Board held that such a denial violated Section 8(a)(5) of the Act, and the court disagreed holding that the interview was merely investigative in nature. The Board has since refused to find 8(a)(5) violations under circumstances involving purely investigatory interviews. *Chevron Oil Company*, 168 NLRB 574; *Jacobe-Pearson Ford, Inc.*, 172 NLRB No. 84; *Texaco, Inc., Los Angeles Sales Terminal*, 179 NLRB 976.

But none of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview. In fact, the Section 7 right of individual employees to act in concert "for mutual aid and protection" was not directly considered in those cases. Rather, those cases involved a determination of whether the right of the union to bargain collectively was such that an employer could not legally deny its request to participate in the interview.

This case, therefore, appears to present an issue which we have not heretofore directly passed on, and the *Texaco* line of cases relied on by the Examiner does not provide direct guidance for us here.

After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action. And while the employer's denial of such a request may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not to say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence.

As to the first question, the violation seems to us clear and unequivocal. As to the second, while the question is more difficult, upon reflection we conclude the answer is the same. In *Texaco, supra,* when the employee asked to be represented in the interview, the employer advised that it would not insist on the interview unless the employee was willing to enter the interview unaccompanied by his representative. This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment,[3] or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on

[3] "Reasonable ground" will of course be measured, as here, by objective standards under all the circumstances of the case. We believe our dissenting colleague errs in asserting that "reasonable ground" must be treated as a purely subjective matter.

the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.[4]

This seems to us to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses. We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

In the instant case, we find that King had a reasonable basis for desiring union representation and that Respondent discharged King because she was insisting on that right.[5] There can be no doubt that under the facts and circumstances of this case King had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct. Under these circumstances King reasonably requested union representation. It is also clear that Respondent discharged King for

[4] Here also, our dissenting colleague asserts that we will be compelled to resort to purely subjective considerations in judging employer conduct. We disagree. Whether discipline was imposed for cause, or for discriminatory reasons, is a factual matter with which we regularly deal in cases of 8(a)(1) and 8(a)(3) violations. In literally thousands of cases, this Board has determined whether pretextual reasons were advanced, and we have done so without floundering hopelessly in the elusive subjective considerations conjured up in dissent.

[5] For the reasons set forth by the Trial Examiner, we find that King had not, as Respondent contends, abandoned her job. Respondent does not contend that King was discharged for her actions on October 10, nor would the record support such a contention.

insisting on this right. Therefore, we conclude that King's discharge was in violation of Section 8(a)(1).[6]

II. The Suspension of Mulford and Cochran; the Discharge of Mulford

Turning next to Respondent's suspensions of Mulford and Cochran, Respondent claims that both employees were suspended for being away from their machines without permission. The Trial Examiner finds this reason was pretextual. There is ample evidence in the record to support, and we adopt, this finding. In particular, we note that Mrs. Gerlach testified that union chairladies had left the working floor in the past on union business without being disciplined. It follows that the disparate treatment here was motivated by the Respondent's desire to punish Mulford and Cochran for performing their duties as union chairladies in seeking to represent King at the conference Respondent requested. As such conduct is a protected concerted activity, the suspensions violated Section 8(a)(1) of the Act.[7]

As to Mulford's discharge, it is quite clear that Respondent took this action because Mulford was insisting on representing King. Respondent claims that it did not discharge Mulford but that she abandoned her job. However, we find no merit in this contention as it is clear, for the reasons stated by the Trial Examiner, that Respondent in fact discharged Mulford. Moreover, it is clear that the reason Respondent discharged Mulford was her insistence

[6] We deem it unnecessary to determine whether the discharge also violated Sec. 8(a)(3), as such additional finding would not affect our remedial order.

[7] This case is distinguishable from *Emerson Electric*, 185 NLRB No. 71 (Member Jenkins concurring) in that the action taken against the two employees was in fact taken because they had left their work stations without permission, whereas in the instant case that reason was pretextual.

on representing King. Thus she was discharged for engaging in a protected concerted activity, and the discharge violated Section 8(a)(1) of the Act.[8]

III. The Discharge of Cochran

Finally, as to Cochran's discharge, it is clear that Respondent discharged Cochran because she sought to engage in a protected concerted union activity, filing grievances on behalf of herself, Mulford, and King.[9] Thus her discharge was in violation of Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, Quality Manufacturing Company, Point Pleasant, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as herein modified:

1. Delete paragraph 1(b) of the recommended Order and substitute the following:

"(b) Disciplining any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action."

[8] We deem it unnecessary to determine whether the discharge also violated Sec. 8(a)(3) as such additional finding would not affect our remedial order.

[9] As in the cases of Mulford and King, Respondent contends that it did not discharge Cochran but that she abandoned her job. We find no merit in this contention as it is clear, for the reasons stated by the Trial Examiner, that Respondent in fact discharged Cochran.

2. Reletter paragraph 1(c) as paragraph 1(f) and insert the following paragraphs 1(c), 1(d), and 1(e):

"(c) Requiring, under threat of discipline, that any employee take part in an interview or meeting without union representation, where such representation has been requested by the employee and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action."

"(d) Discriminating against union chairladies for seeking to represent employees at any meeting held with an employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action and the employee has requested such representation."

"(e) Discriminating against union chairladies for seeking to file grievances."

3. In footnote 3 of the Trial Examiner's Decision change "10" to "20" days.

4. Substitute the attached notice for the Trial Examiner's notice.

Dated, Washington, D.C.

January 28, 1972

EDWARD B. MILLER, Chairman
JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER KENNEDY, dissenting in part and concurring in part:

I concur with the decision of my colleagues that the discharge of employee Cochran because, as assistant chairlady, she sought to file grievances on behalf of herself and employees Mulford and King violated Section 8(a)(3) and (1) of the Act. However, because I am of the view that their decision is not supported by the facts and the law, I must dissent to my colleagues' conclusion that the discharge of employee King, the suspension of employees Mulford and Cochran, and the subsequent discharge of Mulford violated Section 8(a)(1), which proscribes interference with, restraint, or coercion of employees in the exercise of rights guaranteed in Section 7.

My colleagues have concluded that it is a violation of Section 8(a)(1) for an employer to discipline an employee who insists on union representation when summoned to an interview with the employer, regardless of whether such interview is investigatory or disciplinary. As I construe their holding, my colleagues seem to say that the right to union representation at such an interview stems not from Section 8(a)(5), as in the *Texaco* case, but directly from Section 7 relating to the right to engage in concerted activities for mutual aid or protection. In my opinion, such holding has no statutory support.

The majority would relegate to the employee whom the employer wishes to interview the determination whether such interview is to be disciplinary or "run-of-the-mill shop-floor conversation." In the event the employee has "reasonable grounds to believe" that disciplinary action might result from the interview, such employee could insist on union representation without fear of discharge or other consequences for such insistence. No suggestion is contained in the majority decision for the standards to be used in testing for "reasonable ground" or for "reasonable basis" for fear that the interview will have an adverse

impact upon the employee's employment status. My colleagues' holding reposes solely in the employee a determination as to the nature and scope of the interview, and makes such employee's state of mind conclusive as to whether the interview may be held with or without union representation. The employer's purpose for the interview, i.e., whether it is to be investigatory or disciplinary, is, under the majority decision here, largely irrelevant. Presumably, the employee whom the employer desired to interview would be under no obligation to disclose to the employer his state of mind or the reason why he desired to be represented by the union. The "reasonable grounds to believe" that disciplinary action might result from the employer's interview with the employee would not have to be revealed. Even in circumstances where the employer assures the employee that the interview is to be purely investigatory the employee could, based wholly upon his own state of mind, decline to participate, unless union representation is permitted him.

Although my colleagues seem to imply that the employer is free to discipline an employee if he suspects the employee is engaging in improper conduct, he must do so only after an interview at which the employee has been represented by the union, if the employee has requested representation, or before an interview with the employee is requested. To do otherwise could subject the employer to a complaint that the discipline was for insistence on union representation. If disciplinary action is taken after a request for an interview, which interview is declined by the employee unless union representation is permitted, the employee will undoubtedly have to defend himself from an unfair labor practice charge at which the only issue will be the reasonableness of the grounds for the employee's belief that the interview was to be disciplinary in nature. In any such proceeding, only the employee's subjective state of mind will presumably be examined, and the violation

will turn not on any objective considerations but on the subjective state of mind of the employee.

The Board has long held that in testing for interference, restraint, and coercion under Section 8(a)(1) the subjective state of mind of an employee is largely immaterial. *Forest Oil Corporation*, 85 NLRB 85. "Subjective state of mind of employees is of little weight" in determining whether Section 8(a)(1) is violated. *B. M. C. Manufacturing Corporation*, 113 NLRB 823, 825, footnote 8. See also *Bon-R Reproductions, Inc.*, 134 NLRB 429. "To the extent that the testimony in question may disclose the subjective state of mind of the employees . . . it is well established that the test to be applied to determine whether an employer's conduct was violative of the Act is an objective rather than a subjective one. *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 588." *The Rein Company*, 114 NLRB 694, 698.

The majority decision here has the effect of reversing a long line of cases by now holding that conduct of an employer can and will be judged as privileged or violative of the Act depending on how it is interpreted and construed by the employees involved and in what state of mind such conduct actually places such employees. In my view, such holding is contrary to sound interpretation and administration of the Act and is completely unwarranted.

Moreover, the vagueness of the holding of my colleagues here creates myriad and insurmountable problems of implementation and effectuation, not only for the Board, but for employers and unions as well. For instance, how will an employer be able to investigate theft of his products without access to his employees whom he may not suspect of having participated in such thefts but who may have information leading to solution of the crime? The employer may not wish to expose to outsiders knowledge of the thefts or the fact that he is conducting an investigation. Under the holding of my colleagues here, efforts of an employer to uncover such thefts by talking to employees

not involved in them but possibly having valuable information on them could be completely frustrated. If an employer discharges an employee for refusal to participate, unrepresented, in an interview concerning such thefts, in circumstances where the employee was not suspected of having engaged in stealing but did have information concerning the crime, and if such employee filed an unfair labor practice charge, what information will the employee be required to disclose to the Board agent investigating the case to establish a *prima facie* case and to justify a conclusion that he had reasonable ground to believe that disciplinary action would result from the interview with the employer? Shall the union be deemed guilty of an unfair labor practice when it is unable or unwilling to furnish a representative to accompany an employee to an interview with the employer? Other than serving as a witness in the interview, what function will the union representative be required to perform in the discharge of the union's status as collective-bargaining representative?

My colleagues would free an employer to discharge an employee who he suspects would be unwilling to take part in an interview unrepresented by the union. The validity of such discharge would then presumably be tested under the grievance-arbitration provisions of the collective-bargaining agreement. Such holding does not promote an investigation before drastic action is taken and in my view does not accord with the purpose and policy of the Act as set forth in Section 1(b); i.e., to provide orderly and peaceful procedures for preventing the interference by either the employees or employers with the legitimate rights of the other. I am of the opinion that the encouragement of the practice of putting into motion the machinery of inquiry before drastic action is taken would better serve the purposes of the Act.

Although my colleagues appear to have in large part premised their decision on their conclusion that it is a

serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action, the statute, as written and interpreted, does not, in my view, protect employees from violation of each and every individual right. In *Lafayette Radio Electronics Corp.*, 194 NLRB No. 77, we recently affirmed a Trial Examiner's Decision dismissing an 8(a)(5) and (1) complaint based on an employer's refusal to permit a union representative to be present during the employer's interrogation of employees about alleged thefts. There, we affirmed the Trial Examiner's rejection of the contention that the principle underlying the Supreme Court's decision in *Escobedo* v. *State of Illinois*, 378 U.S. 478, should be made applicable in employee interrogations. We rejected the argument that in employer-employee interrogations there exists a statutory right to union representation and said, in effect, that if any such right exists it is a contractual right. Similarly here, the right to union representation during an interview with the employer must, in my view, be based on contract. It should be the subject of the collective-bargaining process like any other term or condition of employment.

With respect to the suspension of employees Mulford and Cochran, and the subsequent discharge of Mulford, I would find that the suspensions and the discharge were the result of their having left their work stations. *Emerson Electric Co.*, 185 NLRB No. 71; *Russell Packing Company*, 133 NLRB 194; *Terry Poultry Company*, 109 NLRB 1097.

Dated, Washington, D.C.

RALPH E. KENNEDY, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discourage membership in Upper South Department, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or discourage activities protected by the National Labor Relations Act, by suspending or discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

WE WILL NOT discipline any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

WE WILL NOT require any employee to take part in an interview or meeting where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action and where we have refused that employee's request to be represented at such meeting by a labor organization.

WE WILL NOT discriminate against union chairladies for seeking to represent employees at any meeting held with an employee where the employee has reasonable grounds to believe that the matter or matters to be discussed may result in his being the subject of disciplinary action and the employee has requested such representation.

WE WILL NOT discriminate against union chairladies for seeking to file grievances.

WE WILL offer Catherine King, Delila Mulford, and Martha J. Cochran each immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent one, without prejudice to the seniority and other rights and privileges enjoyed by each, and make each whole for any loss of pay she may have suffered, with interest at the rate of 6 percent, by reason of her discharge (including also suspension of Mulford and Cochran).

All our employees are free to become, remain, or refuse to become or remain, members of said Upper South Department, or any other labor organization.

QUALITY MANUFACTURING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3686.

TXD-627-70
Point Pleasant, W. Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 9-CA-5576

In the Matter of

QUALITY MANUFACTURING COMPANY and
UPPER SOUTH DEPARTMENT, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Cassius B. Gravitt, Jr., Esq., for the General Counsel, NLRB.

Bernard W. Rubenstein, Esq., Baltimore, Md., for the Charging Party.

John E. Jenkins, Esq., Huntington, W. Va., for the Respondent.

Trial Examiner's Decision

JAMES V. CONSTANTINE, Trial Examiner: This is an unfair labor practice case brought pursuant to Section 10(b) of the National Labor Relations Act, herein called the Act. It was generated by a charge filed on March 19, 1970, by Upper South Department, International Ladies' Garment Workers' Union, AFL-CIO. Said charge names Quality Manufacturing Company as the Respondent.

Thereafter on May 25, 1970, the General Counsel of the National Labor Relations Board, herein called the Board, through the Regional Director of the Ninth Region (Cincinnati, Ohio), issued a complaint against said Respondent. In substance said complaint, which is based on the foregoing charge, alleges that Respondent violated Section 8(a)(1), (3), and (5), and that such conduct affects commerce within the meaning of Section 2(6) and (7), of the Act. Respondent has submitted an answer admitting some allegations in the complaint but denying that it committed any unfair labor practices.

Pursuant to due notice this case came on to be heard, and was tried before me, on August 5 and 6, 1970, at Point Pleasant, West Virginia. All parties were represented at and participated in the trial, and had full opportunity to adduce evidence, examine and cross-examine witnesses, file briefs, and present oral argument. Briefs have been received from the General Counsel and the Charging Party. A short memorandum has been submitted by Respondent.

This case presents the issues of whether Respondent

1. Refused to allow an employee to be represented by the Charging Party at a meeting called by Respondent to reprimand and discipline said employee.

2. Threatened to take reprisals against employees because of their union activities.

3. Suspended, or discharged, or did both to, employees because of union membership or activities, or because of protected concerted activities, or both.

4. Shut down its plant and laid off employees in its production and maintenance unit for about 12 days to discourage membership in, or activities for, their union, or to discourage them from engaging in protected concerted activities, or both.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. AS TO JURISDICTION

Respondent, a West Virginia corporation, is engaged at Point Pleasant, West Virginia, in manufacturing women's clothing. During the year preceding May 25, 1970,

when the complaint herein issued, Respondent sold and shipped products valued in excess of $50,000, directly to customers located outside the State of West Virginia. I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction over Respondent in this proceeding.

II. The Labor Organization Involved

Upper South Department, International Ladies' Garment Workers' Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *General Counsel's Evidence*

On or about October 24, 1968, the Union won an election to become, and on or about November 1, 1968, it was certified as, the exclusive bargaining representative of Respondent's employees in an appropriate unit. Thereafter the parties negotiated and executed a collective bargaining agreement. The answer concedes that said unit consists of Respondent's production and maintenance employees, excluding all office clerical employees, professional employees, and guards and supervisors as defined in the Act.

1. The suspension and discharge of Martha J. Cochran

Martha Cochran was employed as a machine operator by Respondent. While so employed she was secretary-treasurer and assistant shop chairlady for the Union at Respondent's plant. As assistant chairlady she represented, during the absence of the chairlady, employees in presenting grievances to management. She also served on the Union's negotiating committee.

On the morning of October 13, 1969, employee Catherine King asked Cochran to represent King on a grievance.

Agreeing to do so, the two went to Mr. Gerlach's office. However, they first talked to Mrs. Mary Gerlach, Respondent's production manager. But Mrs. Gerlach warned Cochran to go back to work "if you want your job." Continuing, Mrs. Gerlach stated that "we want to talk to [King] . . . where we left off Friday." At this point Cochran stated "that is union business and [King] has asked me to represent her." King refused to talk to Mrs. Gerlach without Cochran's being present "as Union representative."

Soon Cochran and King met with Gerlach, Sr. When Cochran asked him if he was going to give King the latter's timecard, he replied that he would not until King "came into the office and talked to him in private." Although Cochran protested that King "wants representation," Gerlach insisted he would talk to them "one . . . at a time." When Cochran asked him what he wanted to talk to King about, Gerlach replied that it was none of Cochran's business. Cochran remained there with King, and told Gerlach they would "sit out there [outside the office] until [he] decided to give [King] her card." Soon Cochran's card "was pulled" at about 7:30 a.m.

On October 14 Cochran entered the plant to work. Again she accompanied King to the office of Gerlach, Sr., and asked him if he was going to give King the latter's timecard. Gerlach answered that he would do so only if King came into his office to "talk to him in private." When Cochran asked for her own timecard, Gerlach replied that she was suspended—"penalized"—for 2 days for being away from her machine. Thereupon Cochran and King departed from the plant.

The next day King and Cochran, accompanied by employee Delila Mulford, went to the office of Gerlach, Sr., at about 7 a.m. When Mulford asked for King's card, Gerlach said he would not give it until King saw him alone in his

office. Then he informed them that Cochran was still suspended. Thereupon the three left.

On October 16, her suspension having ended, Cochran reported for work. Accompanied by King, Cochran went to Mrs. Mary Gerlach at about 7:20 a.m. Soon Delila Mulford joined them. Although Cochran worked that morning, King and Mulford did not. At the close of the lunch hour, i.e., at about 11:50 a.m., Cochran presented some written grievances to Gerlach, Jr. But Gerlach refused to entertain them on the ground that he was "leaving town." So Cochran placed the written grievances on Gerlach's desk. However, Gerlach threw them in the trash can.

Shortly after the last described incident Gerlach "pulled" Cochran's timecard, and then told Cochran "you're not working this afternoon. You're nothing but a damn smart aleck." This caused Cochran to call on Gerlach, Sr. When Cochran asked if Gerlach, Jr., had fired her, Gerlach, Sr., replied, "You heard what he said. You worked this morning but you're not working this afternoon." When Cochran asked what she was supposed to do, Gerlach, Sr., replied "Just go on home . . . and draw unemployment." As she left Cochran accused Gerlach, Sr., "you don't know how to run a business."

Later that day Cochran telephoned Katherine Stephens, Respondent's secretary, inquiring whether "Mr. Gerlach" wanted her to report back to work the next day. Stephens replied that he did not. Thereupon Cochran informed Stephens that Mr. Gerlach could reach her at Cochran's home phone when he needed her. However, Cochran has neither been called since then nor otherwise been notified to return to work.

Respondent has a policy of requiring employees to obtain permission to leave a work station. The president of the Union's local, Alice Hoschar, always obtained permission

to leave the floor to discuss union matters with management.

2. The suspension and discharge of Delila Mulford and the discharge of Catherine King

Mulford was employed by Respondent to piece skirts. She also served as the Union's chairlady at Respondent's plant. Respondent was notified by Union Business Agent Elizabeth Wiley and by Mulford that Mulford had been selected to act as such chairlady. On about October 1, 1969, Mulford presented a written grievance on behalf of an employee to Gerlach, Jr. He replied that he was "not going to fool with that grievance, that he was going to close the plant down around December the 1st."

On October 10, 1969, Mulford as chairlady met with Mrs. Gerlach, Gerlach, Sr., and Gerlach, Jr., to discuss piece rates including that of Catherine King. During the conversation Gerlach, Jr., told Mulford that if she "did not like the way it was there in the company to go elsewhere." Mulford had not obtained permission to leave her work station on this occasion, and the Gerlachs told her to go back to work.

Later that day, as a result of differences between Mrs. Gerlach and employee Catherine King, Mrs. Gerlach ordered King to go to the office. This caused King to ask Mulford to accompany her there. Although Mulford went with King, the former was ordered by Mrs. Gerlach and Gerlach, Sr., to return to her work station. However, Mulford replied that King, as a dues paying union member, was entitled to have Mulford present. Both Gerlachs retorted that Mulford was endangering her job by remaining there. Complying, Mulford returned to her work.

On Sunday, October 12, 1969, Mrs. Gerlach, by direction of Gerlach, Sr., telephoned Mulford not to report to work on the next 2 days, but to come in on the following Wednesday. Mulford knew, although she was not told, that she

was thus being suspended because she had left her job without permission on October 10. So Mulford remained at home on October 13 and 14.

On October 15, when Mulford returned to work, Gerlach, Sr., told her to mind her own business and that she was "going to get trouble" for not minding her own business. Mulford replied that she was minding her business, and that King "had a right to union representation as well as anybody else . . ." Gerlach replied that Mulford had been suspended 2 days "for coming off of the floor with Catherine King." However, Mulford refused to go to work until she "found out what was happening to" King and Cochran. Mrs. Gerlach, who was also present, answered that Cochran "was suspended yet," and that King "was wanted in the office without" Mulford. Then Mulford went back to work.

The next day, October 16, Mulford accompanied by King and Cochran, went to the outer office to ascertain "what was going to happen" to the latter two employees. Mrs. Gerlach instructed Cochran to go to work and directed King to see Gerlach, Sr., in the office without Mulford. Thereupon Gerlach, Sr., who was present, told King that "if she went out the door . . . she was finished." Since King refused to see Gerlach, Sr., without Mulford, King "didn't have anything else to do but to" leave, i.e., go out the door. At this point Mulford asked Gerlach, Jr., whether he wanted her to go to work. He replied, "No. You've abandoned your job. You're finished."

3. The layoffs of October, 1969

On October 28, 1969, machine operator Vonna Oliver and all the other machine operators were laid off by floorlady Helen Rice. At the same time Rice informed Oliver that "We've run the work out . . . I don't know when we'll call you back. Until this mess gets straightened up I just don't know." Sometime in early November, 1969, Oliver was called back to work. Another employee laid off by Rice on

October 29 or 30 is Alice Hoschar. Rice told her, "I'll am going to lay you off until this mess is straightened out." Hoschar returned to work on November 12.

4. Threats of reprisals

Alice Hoschar is president of the Union's local at Respondent's plant. On January [illegible] 1970, she asked Gerlach, Jr., why Mary Goodnight was taken off the operation Goodnight was performing and such operation was assigned to Maxine Warner, an employee with less seniority. Gerlach insisted he had a right to make such assignments. He also instructed Hoschar not to "come off the floor with a girl" during working hours. Later the same day Gerlach, Sr., told her that he had suspended Delila Mulford for "coming off the floor with King."

5. Other evidence in support of the complaint

About December 3, 1969, Joel Goolst, an organizer for the Union, requested Lawrence B. Gerlach, Jr., Respondent's general manager, to reinstate the above three discharged employees, i.e., King, Cochran, and Mulford. Gerlach refused, giving reasons. The reason he gave for denying reinstatement to Catherine King is that she "would not come into the office alone" but wanted "somebody else in the office when she presented her grievance," although for 25 years prior to this she had been a friend of the family and "talked directly to the family." He also explained that employees Mulford and Cochran were discharged because they came off the floor without permission to present a grievance as chairladies of the Union. The grievance was that of employee King. Chairladies are union representatives who present grievances on behalf of employees to management.

Continuing, Gerlach stated that he did not want a union, and hoped that the Union would "open up another factory in town and take the union people there" so that he "could

run his business without a union." Further, at this meeting Gerlach mentioned more than once that he did not understand why grievances had to be written and "why people couldn't come and talk to him as they have done in the past before the Union came around."

Goolst had previously requested reinstatement of said three employees about November 19, 1969. At that time Gerlach, Jr., denied this request for the same reasons mentioned at the foregoing meeting on December 3.

About November 19, 1969, Union Organizer Goolst talked to Respondent's General Manager, Lawrence B. Gerlach, Jr., requesting reinstatement of three employees. As noted above, Gerlach refused. Further, Gerlach stated he would close down before he reinstated these three employees and pointed out that he had closed the plant once before rather than take back a discharged employee named Joanne Sheets. Gerlach added that "I can do it again."

At the foregoing November 19 meeting Goolst also discussed with Gerlach the shutdown of Respondent's plant from October 28 to November 10, 1969. Gerlach insisted that he "did not want the work until this union thing gets straightened out," and that Gerlach so informed his supplier in Cleveland, Ohio, one Paul Marcus.

About January 12, 1970, Goolst again spoke to Gerlach, Jr., concerning the three discharged employees. This time Gerlach mentioned there was a possibility of taking them back "if we could work something out . . . if [the Union] would not press for any backpay money" and also dropped "charges or grievances" for such discharges. Gerlach also observed that "because the three troublemakers are out of the factory . . . there's no reason for any grievances. Everybody's happy."

About January 21, 1970, Goolst spoke to Lawrence R. Gerlach, Sr., Respondent's president, regarding the three discharged employees. Gerlach refused to take them back

because "their conduct in the plant and their conduct to him was such that he couldn't have them back . . . they no longer have respect" for management.

About October 20, 1969, Mrs. Elizabeth Wiley, a union business agent, spoke to Gerlach, Sr., about rehiring the three dischargees, i.e., King, Cochran, and Mulford. Gerlach replied that these three had been giving him a lot of trouble "and [King] didn't want to come into the office and talk to me without having union representation. And that I am not going to allow." Gerlach added that he did not further desire to discuss this problem or "any other damn union problem" or else he would "close the plant."

On about October 20, 1969, Mrs. Wiley asked Gerlach, Jr., to take back the three discharged employees. Replying, he objected that the Union was trying to tell him how to run his plant and that he would "close the plant" as he could not stand the "worry and aggravation."

On October 28, 1969, Mrs. Wiley spoke to Gerlach, Jr. Gerlach added that "it's a constant turmoil in here," and that he did not want any work "as long as I'm having all this union trouble." Nevertheless, in response to Wiley's question, Gerlach stated that his supplier, Marcus, could supply him with work. On October 30 Respondent laid off some employees.

On November 13, 1969, Wiley again asked Gerlach, Jr., to take back the three discharged employees. But Gerlach replied, "Absolutely not," because they were "nothing but trouble makers." On November 25 Wiley again interceded with him on behalf of these three employees, but without success. In fact Gerlach said he would close the plant if Respondent was "forced to bring them back."

B. *Respondent's Evidence*

Mary Kathryn Gerlach, Respondent's production manager, with her husband, Lawrence, Sr., and her son,

Lawrence, Jr. owns Respondent. A summary of her testimony follows.

Employees may not leave the work floor during working hours without first obtaining permission to do so from Mrs. Gerlach or floorlady Helen Rice. This had been a company rule from the beginning. At no time has the Union objected to such a rule.

Employee Catherine King worked for Respondent a number of years. During that time King "communicated or talked individually with members of the [Gerlach] family . . . lots of times." A few days prior to October 10, 1969, Catherine King was asked by floorlady Rice to lower the volume of a radio which King had turned on at the latter's work station. Upon hearing the noise from said radio Gerlach directed King to turn off said instrument not only because it "made a heck of a racket," but also because "a company rule [did not] allow [them] in the place." King complied with Gerlach's command.

Some days later, about October 10, King complained that she could not produce her quota. Thereupon King waved her arms and made other gestures at two other female employees who also could not make their quota, and soon their machines were stopped. When Gerlach asked King "what is wrong here . . . what's the commotion," King replied "something about a repair." At this, Gerlach admonished King to "fix it [or] . . . let one of the floor girls [fix] it . . . and quit causing this disturbance." Thereupon King told Gerlach to mind her own business and also "sassed" Gerlach. This caused Gerlach to ask King to accompany her to the office "to talk to Mr. Gerlach, Sr., about it." (Employee Mayme Taylor confirmed Mrs. Gerlach as to what transpired on this occasion.)

However, King asked Delila Mulford to come with her to the office. Mrs. Gerlach then told Mulford that this was not a grievance, that it did not concern Mulford, and directed Mulford to remain at her work station. In fact, Mrs. Gerlach "didn't consider it a union matter." Nevertheless, Mulford, without obtaining permission [1] to leave her work station, went along with Gerlach and King to the office. Mrs. Gerlach told Mr. Gerlach that Mulford was there without permission. Although requested, King refused to speak alone to Gerlach, Sr. Nevertheless the latter told Mulford to return to her machine as he intended to talk to King without Mulford being present. Mulford answered she had a right to be there to represent King, and refused to go back to work immediately. Gerlach, Sr., also told Mulford that she had no business there, that "it wasn't a grievance," that it did not concern Mulford, and to return to her station. Soon, however, Mulford did go back to work.

Mrs. Gerlach denies that she made any threats of reprisals to Mulford, or Hoschar, or any other employee, because of union or other protected activities.

Lawrence Gerlach, Jr., is a part owner of Respondent and its general manager. A summary of his testimony ensues.

Gerlach denies that Respondent's plant was closed between October 29 and November 10, 1969, to discourage membership in the Union. In talking to Union Organizer Goolst about this aspect of the charge in early 1970, Goolst told Gerlach that "it had no merit, that it was injected to give some and take some."

Respondent's principal supplier of work is Stanley M. Feil Company, owned by Paul Marcus of Cleveland, Ohio. Thus Feil is Respondent's only customer. In October, 1969, Respondent was "necessarily supposed to be working on"

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[1] On one occasion, and perhaps it was this one, Mulford presented a grievance, according to Mrs. Gerlach, "at noon hour" and not on working time. See pp. 205-206 of the Transcript. And Mulford's predecessor as chairlady, a Mrs. Holland, handled grievances during working hours without obtaining permission to leave her station. Id. 206.

certain styles for Feil which had been advertised. Patterns for these styles were furnished by Feil. But the piece goods, i.e., the cloth, for such styles, supplied by Mission Valley Mills of New Brownsville, Texas, had not become available at the time. Further, Respondent had piece goods for other styles but had not been supplied with patterns (or markers) for such styles. It is essential that Respondent "have the right patterns for the right goods" before production can start on any style. Hence Respondent in the fall of 1969 "couldn't make dresses." On November 3, 4, and 5, 1969, everybody was laid off but the cutter. The latter during this period performed maintenance work, as "he is too vital of an employee to take a chance on losing." The cutters were called back on the 6th of November.

As employees ran out of work on their particular operation they were necessarily laid off. When piece goods and patterns were received laid off employees were recalled "in the reverse order." But no production employee was laid off when there was work for him to do. Layoffs occur "about every season" because Respondent "did not have the right match of markers [patterns] and materials."

Gerlach also testified that he spoke to Goolst about the three discharges, i.e., King, Cochran, and Mulford, claiming that he told Goolst "we always need operators and two out of three of [the dischargees] was real good and anytime they would obey the same rules as the rest of them they had their job . . . My father wanted a letter though from them to that effect." Although Goolst replied these three would obey the rules Gerlach nevertheless wanted this assurance "put . . . into a letter form." He further testified that if he uttered any antiunion statements to Goolst they were uttered in jest or "horseplay." And Gerlach insisted that King, Cochran, and Mulford were not discharged but that "they abandoned their employment by their own action."

Gerlach also testified that the Respondent has a rule that "nobody leaves the stitching room floor without permission." And he denied threatening to take reprisals against an employee because of union activities, as alleged in paragraph 8(c) of the complaint.

During the noon or lunch hour of October 16, 1969, Martha Cochran asked Gerlach to discuss some grievances with her. He replied that, as he was going out of town, he could not then do so, but would take them up with her upon his return the following Monday. In fact, he would not even receive the written grievances at that time but wanted to wait until Monday. But Cochran insisted "By God, you'll take time" to consider the grievances at the time. Shortly thereafter Gerlach "pulled" Cochran's card and told her she would not be working that afternoon. When Cochran asked if she had been fired, Gerlach repeated that she would not be working that afternoon, but that she was not fired. (However, employee Mayme Taylor, who testified for Respondent, stated that although she heard Cochran asked if Cochran had been fired, Gerlach said nothing in reply. On the other hand, other witnesses for Respondent, testified that Gerlach answered that Cochran had not been fired.) Although Cochran shortly thereafter telephoned that "if we wanted her [to come back to work] we could call," Respondent never did call her back to work. Gerlach insisted that Cochran was sent home that afternoon because she barged in on him and demanded immediate consideration of some grievances.

Gerlach denied that he told Delila Mulford that the plant would be closed on December 1, 1969. Nor did the plant close on that day.

Explaining the discipline of King, Gerlach stated that she was so disciplined for violating a rule. On being cross-examined he referred to this rule as "a request to have a conference with an employer . . . alone," i.e., she demanded to have a union steward present with her. He "contended it is management's right to have a personal conference with

an employee." Gerlach, Sr., "wanted to speak to [King] in a private manner . . . about her conduct," according to Gerlach, Jr. "And if something there is said that is not right they have a grievance procedure to go through." But he added that King "violated [another] rule by causing a disturbance on the floor and also by playing a radio." However, Gerlach insisted that King was not fired but had "abandoned her job."

Mary Stephens, Respondent's secretary, in substance testified as follows. On October 10, 1969, a Friday, employees Catherine King and Delila Mulford came to the office. Mr. Gerlach asked King to see him alone, as he wanted to talk to her "a couple of minutes." At the same time Gerlach inquired of Mulford what she was doing there. When Mulford replied that "she came down with" King, Gerlach admonished her that Mulford wasn't supposed to come off the floor . . . that was against the rules." However, Mulford insisted she "would come off any time that she wanted to." Thereupon Gerlach directed Mulford to go back upstairs and he would decide what he would do about her attitude. Then Gerlach stated he wanted to talk to King alone. But both King and Mulford then left together, because King refused to speak to him alone.

The following Monday, October 13, King and Martha Cochran called on Mr. Gerlach. Stephens was present. Again Gerlach asked to speak to King alone for a couple of minutes. But King refused to speak to him unless Cochran was also present. At one point of the conversation King called Gerlach a hog.

On October 14, 1969, King and Cochran again came to the office. Gerlach repeated his desire to speak to King alone for "a couple of minutes," but Cochran insisted this could not be done as Cochran would have to be present during any such conversation. Although Gerlach then ordered Cochran to return to work, she refused to do so. Soon Cochran and King left the plant.

On October 15, King, Cochran, and Mulford came to the office. Soon Mulford went to work. Then Gerlach asked King to talk to him alone, but Cochran forbade this, insisting that she had to be with King. Not long after this King and Cochran went home.

The above three employees again came to the office on October 16. Cochran immediately went to work. Although Gerlach asked to speak to King alone, Mulford insisted on being present during the conversation. As King and Mulford left, Gerlach told them that "if you go out the door this time I consider you have abandoned your job as I have put up with you for a week on this." Nevertheless King and Mulford went out the front door and left the plant. At about 2 p.m. on October 16, 1969, Cochran telephoned Stephens that Cochran was not coming back to work until called back to work by Stephens. But Stephens never did call Cochran although it was part of the former's job to call back employees who had been laid off. However, Stephens insisted that she called back laid off employees only when told to do so, and she was not told to recall Cochran.

Stephens also testified that Respondent had adopted a rule that employees had to have permission to leave the sewing room floor during working hours, and that it had been in force for a considerable period of time before 1969.

Another important witness for Respondent is Paul Marcus. An abstract of his testimony follows.

Marcus is connected with Stanley M. Feil, Incorporated, of Cleveland, Ohio, a dress manufacturer. For several years Feil has given orders to Respondent. The latter fills said orders by supplying Feil with manufactured dresses. In this connection it is the responsibility of Feil to purchase the cloth for such dresses from various mills throughout the country and cause it to be shipped to Respondent to use in producing dresses for Feil. In addition Feil supplies Respondent with markers or patterns to be used in

making the dresses ordered by Feil from Respondent. Finished dresses are sold by Feil; they are shipped by Respondent to Feil's customers as directed by Feil. According to Marcus, Respondent manufactures exclusively for Feil and does no work for anyone else.

Mission Valley Mills of Brownsville, Texas, is one of those supplying Feil with cloth to be used by Respondent in fulfilling Feil's orders. In October, 1969, Mission shipped fabric to Feil which, because it was damaged, was unacceptable to Feil. Markers for such cloth had been furnished to Respondent by Feil. As a result, Respondent was unable to produce the styles of dresses which Feil intended to be made from this fabric. At that time Respondent had other good cloth on hand for other styles but had not received from Feil the markers necessary to produce dresses from such cloth.

As a consequence Feil sought to rectify the situation by (a) seeking to obtain first quality material to replace the damaged cloth, and (b) producing markers to be used by Respondent in utilizing the good cloth Respondent had on hand. As to (a), Feil was so desperate for cloth that it transported by air good materials obtained from Mission, an expensive and costly operation. Considerable time (about 3 weeks) elapsed before Feil was able to supply Respondent with acceptable cloth under (a) above, and markers under (b) above. See Respondent's Exhibit 4. During some of this time Respondent was forced to curtail operations and, therefore, laid off employees. Because these are seasonal dresses, Feil lost some money because dresses were not available for the entire season.

Respondent concluded the presentation of its defense with Lawrence K. Gerlach, Sr., its president. An abridgment of his testimony follows.

Gerlach has known employee Catherine King for several years. As an employee, King "made it a practice" to "visit" Gerlach's office daily and he sometimes called her

to the office as well. On October 10, 1969, Mrs. Gerlach, King, and Delila Mulford came to the office. Mrs. Gerlach complained of King's conduct which had "created quite an excitement [and] which stopped a lot of operators from working." Then Mrs. Gerlach left. Although Gerlach warned Mulford to return to work because it was against the rules to leave her work station without permission, Mulford insisted on staying with King.

At this point Gerlach invited King into the office alone so he could speak to her, but King refused unless Mulford also went in with her. Thereupon Gerlach instructed both to resume work. However, Gerlach asked Mrs. Gerlach to suspend Mulford for 2 days.

Just before work started on the following Monday, October 13, King came to the office accompanied by employee Martha Cochran. Notwithstanding that Gerlach requested Cochran to go to work, Cochran insisted on staying with King. And when Gerlach expressed a desire to speak to King she refused unless Cochran also remained with her. Shortly thereafter King called him a hog.

On October 14 King and Cochran again came to the office before work started. Although Gerlach requested Cochran to proceed to her work station, she persisted in staying there with King. When Gerlach asked King to speak to him alone, she refused. Soon both King and Cochran departed from the plant.

On October 15, King, Cochran, and Mulford appeared at the office. Although Gerlach told all three to report to work, only Mulford obeyed; Cochran refused. When Gerlach asked to speak to King, she refused to do so except in the presence of Cochran.

The next day the above three employees again showed up at the office. When Gerlach told them to go to work, only Cochran complied. Mulford insisted on staying there

with King. Although Gerlach asked to speak to King she refused unless "somebody else [was] with her." This caused Gerlach to remark, that they return to work or else he would consider they had abandoned their jobs when they "went out that door." Soon Mulford and King left the plant. Neither Mulford nor King has "come around" since then.

At noon on October 16 Cochran reported to Gerlach, Sr., that Gerlach, Jr., had fired her, and asked the former to confirm it in writing. But Gerlach, Sr., insisted that she had not been fired. At this Cochran told him that neither he nor any of his family had enough sense to run a business.

Gerlach denies that he ever told Union Officials Goolst and Wiley that Respondent would not take back King, Cochran, and Mulford.

C. *Concluding Findings and Discussion*

The burden of proof rests upon the General Counsel to establish his case by a fair preponderance of the evidence, and no obligation rests upon Respondent to disprove any of the allegations of the complaint. *Hawkins* v. *N.L.R.B.*, 358 F. 2d 281, 283-284 (C.A. 7). I have been guided by this precept in arriving at the findings which follow.

1. As to the suspension and discharge of Martha J. Cochran

It is my opinion, and I find, that Cochran was suspended for 2 days beginning October 14 for activity protected by the Act, i.e., representing employee King in Cochran's capacity as assistant chairlady of the Union. I find this violates Section 8(a)(1) and (3) of the Act. And I also find that the reason given her for suspending her, i.e., for being away from her machine without permission, is a pretext to disguise the true reason.

The foregoing findings are based on the entire record and the following subsidiary facts, which I hereby find:

a. Respondent had no written, posted, or oral rule against leaving a work station without permission. In this respect, I credit the General Counsel's witnesses and do not credit Respondent's evidence inconsistent with said finding. I recognize, and find, that employees may not leave their work station during work hours whenever they wish and that it is impliedly understood that permission must be obtained to leave for protracted periods of time. Hence I find it is not necessary to communicate to employees the necessity of remaining at work during working time unless excused therefrom.

Nevertheless, this unwritten rule against leaving a work station at will cannot operate to prevent a union steward from accompanying or representing an employee who requests union representation in a conference with the employer, especially when such conference may result in a reprimand or sterner discipline. For the Act guarantees union representation at such conferences; and written or unwritten rules which conflict with such guarantee are to that extent invalid.

Moreover the contract between the Union and Respondent overrides and renders ineffective any rule forbidding union representatives to leave a work station regarding grievances without permission. Nothing in said contract compels a union representative to obtain permission to discuss grievances with the employer. In fact the tenor of said contract implies that such permission is not a condition precedent. See Article XXIII, Section 1(a) and 2, where it is provided that

> 1. Any and all disputes, complaints, controversies, claims, or grievances whatever between the Union or any employees and the Employer which directly . . . relate to . . . the acts, conduct, or relations between the parties shall be adjusted as follows: (a) The Shop

> Chairlady, together with a representative of the Union, shall attempt to settle the matter with a representative of the Employer. . . . 2. It is intended that this provision shall be interpreted as broadly and inclusively as possible. (Charging Party's Exhibit 1.)

b. Cochran was the Union's assistant chairlady, and Respondent had actual knowledge thereof. Respondent's evidence denying such knowledge is not credited. In any event I find that such knowledge may be imputed to Respondent under the Board's small plant rule. And I find that Respondent operated a small plant. *Angwell Curtain Company, Inc.* v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7).

In this connection I find that the meeting between King and Respondent related to King's alleged misconduct in connection with her duties and could result in a reprimand or severer discipline. *Texaco, Inc.*, 168 NLRB 361, 362. And I expressly find that such meeting did not seek information and was not investigatory in nature. Hence the Court's reversal of the Board in *Texaco, Inc., supra,* is not controlling. See 70 LRRM 3045, C.A. 5. Cf. *Texaco, Inc.*, 179 NLRB No. 157; *Jacobe, Pearson Ford, Inc.*, 172 NLRB No. 84; *Chevron Oil Company,* 168 NLRB 574, 579.

c. Respondent entertained antiunion animus and committed other unfair labor practices, as found herein. While I am aware that an employer may constitutionally oppose unions and is free to say so (*N.L.R.B.* v. *Threads, Inc.*, C.A. 4, 308 F. 2d 1, 8; *N.L.R.B.* v. *Howard Quarries,* C.A. 8, 362 F. 2d 236; *J. P. Stevens & Co., Inc.*, 181 NLRB No. 97, p. 4), nevertheless hostility to unions is a factor which may be appraised or evaluated in arriving at the true motive prompting a suspension or discharge. *N.L.R.B.* v. *Georgia Rug Mill,* 308 F. 2d 89, 91 (C.A. 5); *Maphis Chapman Corp.* v. *N.L.R.B.*, 368 F. 2d 298, 303-304 (C.A. 4).

d. Cochran was active in the union movement. She also was an experienced employee with a long service record.

Discipline of active union adherents, especially if they are experienced employees, is a factor which I have taken into consideration in determining the true reason behind Cochran's suspension.

It is true that "management can [discipline] for good cause, or bad cause, or no cause at all without incurring liability under the Act." *N.L.R.B.* v. *McGahey,* 233 F. 2d 406, 413 (C.A. 5). But "obviously the [discipline] of a leading union advocate is a most effective method of undermining a union organizational effort." *N.L.R.B.* v. *Longhorn Transfer Service, Inc.*, 346 F. 2d 1003, 1006 (C.A. 5). In this connection I have been mindful of the modern doctrine that direct evidence of a purpose to violate the statute is rarely available because employers have acquired sophistication as to how to get rid of union members for alleged lawful cause. *Hartsell Mills* v. *N.L.R.B.*, 111 F.2d 291, 293 (C.A. 4); *N.L.R.B.* v. *Melrose Processing Co.*, 351 F.2d 693, 698 (C.A. 8).

e. It is not necessary that protected activity be the only reason responsible for Cochran's suspension. If the suspension was inflicted substantially because of Cochran's protected activity it violates the Act notwithstanding a valid ground for discipline might exist. *Betts Baking Co.* v. *N.L.R.B.*, 380 F.2d 199 (C.A. 10); *N.L.R.B.* v. *Whitin Machine Works,* 204 F.2d 883, 885 (C. A. 1). I expressly find that Cochran's protected activity was a substantial—but not necessarily the only—reason for her suspension. Cf. *N.L.R.B.* v. *Symons Mfg. Co.*, 328 F.2d 835, 837 (C.A. 7); *N.L.R.B.* v. *Park Edge Sheridan Meats,* 341 F.2d 725, 728 (C.A. 2).

f. Finally, I find that membership in, or activities on behalf of, a labor organization, or both, do not immunize or shield an employee from punishment for cause. *Metals Engineering Co.*, 148 NLRB 88, 90; *Mitchell Transport, Inc.*, 152 NLRB 122, 123, affirmed sub nom. *Hawkins* v. *N.L.R.B.*, 358 F.2d 281, 283-284 (C.A. 7).

In my opinion *Emerson Electric Co.*, 185 NLRB No. 71, 75 LRRM 1028, does not compel a finding that Cochran was not engaged in protected activity. For in *Emerson* the employees who left their work stations to accompany a grieving employee held no office in the union and were not otherwise entitled or authorized to represent the union in grievance matters. But in the instant case Cochran was called upon by King to act as an official union representative. As such representative Cochran was engaging in activity fostered by the Act and the collective bargaining contract between Respondent and the Union. *Socony Mobile Oil Company,* 153 NLRB 1244, 1247, 357 F.2d 661 (C.A. 2).

On the afternoon of October 16, 1969, Gerlach, Jr., discharged Cochran for presenting written grievances to him. Respondent's evidence not consonant with this finding is not credited. I find this violates Section 8(a)(1) and (3) of the Act. Notwithstanding that Gerlach used the phrase "you're not working this afternoon," I find that Cochran was discharged, and that, contrary to Respondent's contention, she did not "abandon" her job. This conclusion is based on the entire record and the following subsidiary facts which I find:

(a) When Cochran confronted Gerlach, Sr., with the language of Gerlach, Jr., and asked Gerlach, Sr., what to do, Gerlach, Sr., instructed her to go home "and draw unemployment." It is reasonable to infer—and I do so—that this interpretation of Gerlach, Sr., refers to a permanent severance of Cochran from her job. This is because unemployment compensation is not payable for an afternoon but rather only for termination from work for at least a prescribed period of a minimum number of weeks. It would have been a simple matter to inform Cochran to return the next morning if Cochran had been suspended for the afternoon only. Yet Gerlach, Sr., refrained from saying so. It is true that Gerlach, Sr., also implied that

Cochran had not been fired, but he did not expressly say so. Hence it became incumbent upon Respondent, in view of the ambiguity of the language used by Gerlach, Sr., to make clear that Cochran was suspended only for the afternoon.

Although Cochran insulted Gerlach, Sr., during this conversation by telling him he did not know how to run a business, I expressly find that she was not discharged for uttering these words.

(b) Later that afternoon Cochran telephoned Respondent's secretary Stephens, as to whether Gerlach wanted Cochran to report to work the next day. It is significant that Stephens replied in the negative after consulting with Gerlach. Patently this reply points to the conclusion that Cochran had not been suspended for the previous afternoon only. And I find that it was reasonable on the part of Cochran, in view of said answer by Stephens, to tell Stephens that thereafter Cochran could be reached by telephone at her home when Respondent needed her. It was not necessary that Cochran constantly keep calling Respondent to ascertain when, if ever, she would be rehired. On this branch of the case I credit Cochran and do not credit that part of the testimony of Stephens inconsistent therewith.

(c) Nor did Cochran "abandon" her job. Nothing in the evidence which I credit points to this conclusion. Not only (1) did she fail to mention any such attitude as indicative of her construction of the phrase to "go home . . . and draw unemployment," but (2) at no time did Respondent notify her that it construed her absence from work as an abandonment of work. The Board has held that failure to show up for work does not amount to abandoning a job absent (a) evidence of intent to quit, or (b) notice to the employee that the employer no longer regards him as an employee. *Roylyn, Inc.*, 178 NLRB No. 33, 72 LRRM 1043.

(d) Finally, I find that Cochran was a union representative at the time she presented the written grievances to

Gerlach, Jr., that Respondent (for the reasons as delineated above in connection with her suspension) had knowledge that Gerlach was a union representative, and that her discharge under the circumstances contravenes Section 8(a)(1) and (3) of the Act. Cf. *Eastern Illinois Gas and Security Company,* 175 NLRB No. 108.

2. As to the suspension and discharge of Delila Mulford

On October 12, 1969, Mulford was suspended for engaging, on October 10, in activity protected by the Act, i.e., representing employee King in Mulford's capacity as chairlady of the Union. I find this suspension contravenes Section 8(a)(1) and (3) of the Act. In this connection I credit the General Counsel's evidence and do not credit Respondent's evidence insofar as it clashes with that of the General Counsel. And I find that Respondent's contention that Mulford was suspended for leaving her job without permission is a pretext to mask the true reason.

The above findings are based on the entire record and the following subsidiary facts, which I hereby find:

(a) For the reasons set forth above in finding that Cochran's suspension was unlawful I find that Mulford's suspension was unlawful and that it violates Section 8(a)(1) and (3) of the Act. Those reasons are hereby incorporated by reference and need not be repeated *verbatim.*

(b) As in the case Cochran, I find that Respondent had knowledge that Mulford represented the Union, i.e., as chairlady. But I find an additional reason existed in Mulford's case whereby Respondent was cognizant of her representative capacity. This additional reason is recited in the next two paragraphs. These two paragraphs summarize pertinent testimony adduced by Respondent at the trial of this case.

About October 10, Mrs. Gerlach, Respondent's production manager, invited employee King to talk to Mr. Gerlach,

Sr., about King's behavior which was disapproved by Mrs. Gerlach. Thereupon King requested Mulford to accompany King to the office. However, Mrs. Gerlach directed Mulford not to leave her work station, insisting to Mulford that this matter was "not a grievance." At the trial Mrs. Gerlach testified she "did not consider this a union matter." I find that the language used by Mrs. Gerlach towards Mulford reasonably connotes that the former was aware of the latter's capacity as a union representative. By referring to grievances and union matters in forbidding Mulford to come with King, Mrs. Gerlach must have known that Mulford was the union's representative on grievances and union matters. Otherwise there was no occasion to mention these subjects if Mrs. Gerlach believed that Mulford was invited to come merely as another employee without representative status.

When Mulford and King arrived at the office, Gerlach, Sr., told Mulford she had no business being there because "it wasn't a grievance." It is reasonable to infer—and I do so—that Gerlach would not have mentioned a grievance unless he had knowledge that Mulford was a union representative on matters relating to grievances.

On October 16, 1969, Mulford was discharged for engaging in protected activity, i.e., representing, in her capacity as union chairlady, employee King. This discharge violates Section 8(a)(1) and (3) of the Act, and I so find. I further find that Respondent's defense that Mulford abandoned her job is a pretext to cover up the true reason. This ultimate finding is based on the entire record and the ensuing subsidiary facts which I hereby find:

(a) Respondent had no express rule against leaving a work station without permission. Even if it had such a rule it was superseded as to union representatives protecting the interest of employees not only by the Act but also by the contract between Respondent and the Union.

(b) Respondent had knowledge that Mulford was the Union's chairlady, as more fully set forth above.

(c) Respondent entertained antiunion hostility and also committed other unfair labor practices. This conduct has probative value in ascertaining the actual reason for Mulford's discharge.

(d) Mulford was active in the union movement and also was an experienced employee with several years of service for Respondent.

(e) It is sufficient to find the discharge illegal that Mulford's protected activity was a substantial or motivating reason behind her discharge. Such activity need not be the only reason. Hence it is immaterial that legal cause may have existed also for her discharge, since I find that Mulford's protected activity was a substantial or motivating reason for her discharge.

(f) Mulford did not abandon her job. This is because I find that she did not intend to quit and that at no time did she inform or apprise Respondent that she was relinquishing or surrendering her job.

As found above, I find that Mulford was discharged. This finding in part is derived from the fact, which I find, that Gerlach, Sr., discharged Mulford but used language describing such discharge as "abandoning" the job. Yet at no time did Mulford abandon her employment, and I so find. The facts surrounding such incident are narrated in the next paragraph.

On October 16, 1969, Mulford accompanied employee King to the office to represent King when the latter wanted to know "what was going to happen to King." Mrs. Gerlach, however, instructed King to see Mr. Gerlach alone without Mulford. But King was reluctant to see Mr. Gerlach unless Mulford was also present. This caused Mr. Gerlach to say to King that if King went out the door without seeing him alone she "was finished." But Mulford decided to remain with King. In view of this Mulford asked Mr. Gerlach if he wanted her to go to work. He replied "No. You've abandoned your job. You're finished." On this issue I accept Mulford's version of the incident and do not credit Respondent's evidence insofar as it is contrary to Mulford's testimony. Hence I find that, notwithstanding the language used by Gerlach, Mulford (1) was discharged and (2) did not abandon her job.

3. As to the discharge of Catherine King

King did not testify because of illness. Since her absence is satisfactorily explained, no adverse inference can be drawn from her failure to appear. And I find that the record has been adequately developed to render a finding whether her discharge was lawful. Cf. *American Grinding & Machine Co.*, 150 NLRB 1357, 1358-1359.

I am persuaded, and find, that King was discharged, contrary to the provisions of Section 8(a)(1) of the Act, for engaging in protected activity, and that she did not abandon her job as argued by Respondent. I credit the General Counsel's evidence on this branch of the case and do not credit Respondent's evidence to the extent it is inconsistent therewith. This ultimate finding is based on the entire record in this case and the following subsidiary facts, which I hereby find:

(a) Respondent desired to speak to King concerning King's behavior on the job. While the nature of such talk with King is not clearly disclosed in the record, I find that it at least included King's (1) operating her radio in a loud manner at work, and (2) causing a disturbance among employees. And I find that such talk was not investigative in nature because Mrs. Gerlach personally observed King's alleged derelictions on the job and needed no further inquiry to ascertain the facts. Hence *Texaco, Inc.*, 179 NLRB No. 157, 72 LRRM 1596, is not controlling on this phase of

the case. Further, I find that such talk, regardless of whether actual disciplinary measures are imposed thereat, is so intimately connected with working conditions that, under the contract, King was entitled to be represented by a representative of the Union during the course thereof. (See Article XXIII, Section 1, of the Contract between Respondent and the Union. Charging Party's Exhibit 1.) The Act also conferred such a right upon her.

(b) Since Respondent invited King a few times and at least once ordered her to come to the office, I find that, in going to the office at Respondent's request or command, King did not leave her work station without permission.

(c) Further, I find that King could properly refuse to speak to management without being accompanied by a union representative, and that King's refusing to speak to management in the absence of such representative cannot be characterized as insubordination or other misconduct warranting her discharge. Actually, King was suspended after the first time she refused to speak to management alone, so that thereafter she appeared with a union representative at the office as a suspended employee. Patently she left no work station on those occasions when she called at the office during the suspension period.

(d) On October 16, 1969, King went to the office with union representatives Cochran and Mulford. Soon Cochran left to go to work. At this point Gerlach, Sr., asked to speak to King alone, but King denied this request. Thereupon Gerlach told King that if King "went out the door" she was "finished." Shortly thereafter King went out the door, i.e., left the plant. Since King was still on suspension at the time she could not report to work, and thus was compelled to go out the door when she decided not to speak to Gerlach alone. This constitutes a discharge of King and I so find.

That this constitutes a discharge of, and not an abandonment of her job by, King may be deduced from the fact,

which I find, that Gerlach, Sr., offered King an ultimatum permitting but two unacceptable alternatives. These two choices are: either speak to Gerlach, Sr., without a union representative being present, or leave the office in which case King was "finished."

When an employee is thus confronted with two impossible solutions, one of which he is required to adopt, the fact that she refused to accept one of them does not mean that she acquiesced in the other. Since King was not compelled to forego the presence of her union representative, she could not be said to have voluntarily elected to be "finished" by leaving the plant after it became patent that she could no longer remain there without such representative. It follows, and I find, that by leaving the plant King was involuntarily terminated or discharged, and that, if she was "finished," it was not of her own choosing. Cf. *Roylyn, Inc.*, 178 NLRB No. 33, 72 LRRM 1043. Hence she was "finished" by command of Gerlach, Sr. This constitutes a discharge, and I so find. *Wilder Finishing Co.*, 138 NLRB 1017, 1019-1020.

4. As to threats of reprisals

About October 10, 1969, while employee Delila Mulford was discussing piece rates with Gerlach, Jr., the latter told her that if she "did not like it the way it was there in the company to go elsewhere." This is not a threat to take reprisals against Mulford for engaging in union or other protected activity, and I so find. Later that day Mulford accompanied employee King on a grievance of King's. Both Mrs. Gerlach and Gerlach, Sr., to whom Mulford spoke on this occasion, warned Mulford that Mulford had left her work station without permission and that she was endangering her job remaining there without permission. Neither is this a threat of reprisal as it merely directed Mulford not to leave her work station during work hours unless excused properly therefrom. The fact that both Gerlachs misinterpreted the Act and the collective bargaining contract,

i.e., that union representation lawfully did not need employer permission to prosecute grievances, did not convert this warning into a threat to take reprisals.

On October 15, Gerlach, Sr., told Mulford, in connection with the latter's espousal of King's grievance, to mind her own business, and that Mulford was going to get "into trouble" for not minding her own business. In my opinion the word "trouble" is too ambiguous to connote a threat that Mulford was jeopardizing her job. Hence I find that this utterance by Gerlach, Sr., does not invade any rights safeguarded to employees by the Act.

As found above Gerlach, Sr., refused employee King the right to be accompanied by a union representative when Gerlach desired to speak to King alone. I have found above that either a reprimand or greater discipline could have been imposed upon King at the time. And I have found that King was entitled to be so represented. The complaint alleges that the foregoing conduct constitutes a violation of Section 8(a)(1) and (5) of the Act. Nevertheless I find only that it contravenes Section 8(a)(1) in that it denies an employee the right to engage in a protected activity. But I find it does not transgress Section 8(a)(5), as Respondent in no way is failing or refusing to recognize or bargain with the Union.

About January 12, 1970, employee Alice Hoschar asked Gerlach, Jr., why employee Mary Goodnight's job was taken from her and assigned to Maxine Warner who had less seniority than Goodnight. Insisting that this was a prerogative of management, Gerlach, Jr., advised Goodnight not to come off the floor with a girl during working hours. Later that day Gerlach, Jr., informed Goodnight that he had suspended Mulford for coming off the floor with King.

As found above, it is an implied condition of employment that employees may not leave their work stations during working hours (except for restroom visits, emergencies, and authorized breaks) without permission. Cf. *Emerson*

Electric Co., 185 NLRB No. 71, 75 LRRM 1028. But, as found above, this condition does not apply to union representatives engaged in protected activity. Hence I find that, since Hoschar is the president of the Union's local, she could not lawfully be prevented from leaving her work station on this matter which concerned the Union. But I find no threat of reprisal was uttered when Gerlach, Jr., first talked to her. At most, he told Hoschar not to leave her job without permission. Patently this statement is void of containing anything resembling a threat. And the fact that he much later told Hoschar that he suspended Mulford for coming off the floor with King merely amounts to a reference to a past event and cannot, in my opinion, be considered as part of the earlier conversation with Hoschar. Hence I find no violation of the Act in the second of these two conversations of Gerlach, Jr., with Hoschar.

5. As to the layoffs of October, 1969

Upon the entire record I find that paragraph 13 of the complaint has not been established by a fair preponderance of the evidence. This paragraph accuses Respondent of shutting down its plant and laying off employees in the bargaining unit, from October 29 to November 10, 1969, to discourage (a) union membership or activities, or (b) protected activity, or both. While it is true, and I find, that the plant did shut down and employees were laid off during some of this period, I find that such action was not prompted by discriminatory motives. Rather, I find that said action was necessitated solely by reason of economic or business considerations.

In this connection, I expressly find that said business considerations included an inability to obtain proper cloth for new patterns, so that Respondent was compelled to curtail operations temporarily until such cloth was finally shipped to it. On this issue I credit Respondent's evidence. In particular I am impressed with the testimony of Paul

Marcus, whom I credit, that through no fault of Respondent that piece goods, or cloth, for the new styles did not become available on time, so that layoffs became imperative until such cloth was delivered.

It is true, and I find, that floorlady Helen Rice, told employees Oliver and Hoschar, in laying them off, "I don't know when we'll call you back. Until this mess gets straightened up I just don't know." But the word "mess," especially when used in a context of "running out of work," does not necessarily infer union trouble; it may well allude to the production difficulties incurred when defective cloth had been delivered to Respondent by Mission Valley Mills of Brownsville, Texas. Since the word "mess" is ambiguous, I find that on this record the General Counsel has not shown that it connotes union trouble. Indeed no union trouble existed at the time when Oliver and Hoschar, as well as several other employees, were laid off in late October, 1969.

In attempting to demonstrate that the layoff was unlawful, the Union has emphasized the fact that the finishing operators were recalled to work before the sewing employees. But I accept Respondent's explanation that some finishing work is performed before all sewing operations have been completed. In any event, it has not been established that the finishers were nonunion, so that nonunion employees received preference in being recalled following the layoff. It follows, and I find, that the order of recalling employees, under the circumstances, fails to disclose that the layoff itself was motivated by antiunion considerations. Hence I find distinguishable *Columbia Casuals, Inc.*, 174 NLRB No. 13, upon which the Union relies.

On this issue I have not overlooked Gerlach, Jr.'s, statement to Union Representative Goolst on about November 19, 1969, that Gerlach, Jr., "did not want the work until this union thing gets straightened out." Although I find that such statement was uttered, I nevertheless find that it is

insufficient to establish that the layoff of late October, 1969, was called for antiunion reasons. This is because Gerlach, Jr., was not referring to a layoff which had already occurred, but, rather, was adverting to a hypothetical situation which might transpire, in the future. While this depicts antiunion animus on the part of Gerlach, Jr., it fails to denote that a layoff which took place a couple of weeks before this had been inspired by a desire to hurt the Union.

Also, I find that on about October 20, 1969, Gerlach, Sr., told Union Representative Elizabeth Wiley that he did not desire to discuss the three discharges above described, or "any other damn union problem," or else he would close the plant. Patently this discloses a pronounced antipathy to the Union. But it is inadequate to prove that a layoff which became necessary several days later was prompted by antiunion factors. In this connection, I consider it of some import that Gerlach, Jr., on November 13, 1969, told Mrs. Wiley, a union official, that he would close the plant if Respondent was forced to take back the three dischargees mentioned above. In my opinion this shows that Gerlach, Sr., as well as Gerlach, Jr., were not contemplating a layoff to combat unionism but, instead, considered a layoff only as a last resort to prevent reinstating the three discharged employees.

Finally, it is significant that no top official of Respondent informed a single employee that the layoff was intended to discourage adherence to or interest in the Union. This in itself is not conclusive. But it is inconsistent with an alleged intent to frustrate unionism by a layoff. Intended messages must be identified as such. But an uncommunicated intent to embarrass a union by calling an unnecessary layoff will not accomplish such an end. Manifestly employees can neither read an employer's mind nor fathom his unexpressed ulterior motives; and the employer's failure to disclose the purpose behind a layoff cannot be said to reveal the reason which generated it. Hence it is reasonable to be-

lieve that somehow the employer would have led the employees to know that the layoff was an act of reprisal against the Union if the layoff were directed towards the Union. But in the instant case such evidence is lacking. Failure to make known this purpose detracts from the contention that the aim of the layoff was to hurt the Union.

IV. The Effect of the Unfair Labor Practices Upon Commerce

Those activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take specific affirmative action, as set forth below, designed to effectuate the policies of the Act.

In view of the finding that Respondent discriminated against Mulford and Cochran in suspending them, and against Mulford, Cochran, and King in discharging them, it will be recommended that Respondent be ordered to offer to each immediate and full reinstatement to her former position or, if such is not available, one which is substantially equivalent thereto, without prejudice to their seniority and other rights and privileges. It will further be recommended that Mulford, Cochran, and King be made whole for any loss of earnings suffered by reason of the discrimination against them.

In making Mulford, Cochran, and King whole Respondent shall pay to each a sum of money equal to that which each would have earned as wages from the date of her lay-

off to the date of reinstatement or a proper offer of reinstatement, as the case may be, less her net earnings during such period. Such backpay, if any, is to be computed on a quarterly basis in the manner established by *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent calculated by the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. It will also be recommended that Respondent preserve and make available to the Board or its agents, upon reasonable request, all pertinent records and data necessary to aid in analyzing and determining whatever backpay may be due. Finally, it will be recommended that Respondent post appropriate notices.

The discriminatory discharges go "to the very heart of the Act." *N.L.R.B.* v. *Entwhistle Manufacturing Company*, 120 F.2d 532, 536 (C.A. 4); *L. E. Johnson Products, Inc.*, 179 NLRB No. 10, p. 1, n. 1. Accordingly, the Board's Order should be broad enough to prevent further infraction of the Act in any manner; and I so recommend. Cf. *R & R Screen Engraving, Inc.*, 151 NLRB 1579, 1587; *A-Z Mfg. & Sales*, 177 NLRB No. 98, p. 1, n. 1.

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is an employer within the meaning of Section 2(2), and is engaged in commerce as defined in Section 2(6) and (7), of the Act.

3. By discriminating in regard to the tenure of employment of Mulford, Cochran, and King, thereby discouraging membership in the Union, a labor organization, and activities protected by the Act, Respondent has engaged in unfair labor practices condemned by Section 8(a)(3) and (1) of the Act.

4. By refusing an employee the right to be represented by a union representative when Respondent seeks to question such employee concerning his own alleged misconduct in the course of his duties, Respondent has engaged in unfair labor practices prohibited by Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the purview of Section 2(6) and (7) of the Act.

6. Respondent has not committed any other unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusion of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER

Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or any other labor organization, and discouraging activities protected by the Act, by suspending or discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term of condition of employment.

(b) Refusing any employee permission to be represented by a labor organization when Respondent seeks to question such employee concerning his own alleged misconduct in the course of his duties.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Catherine King, Delila Mulford, and Martha J. Cochran immediate and full reinstatement each to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed by them and make each whole for any loss of pay she may have suffered, with interest at the rate of 6 percent, by reason of Respondent's discrimination (including also suspension of Mulford and Cochran) against her, as provided in the section above entitled "The Remedy."

(b) Notify said Catherine King, Delila Mulford, and Martha J. Cochran, if presently serving in the Armed Forces of the United States, each of her right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon reasonable request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other records necessary to ascertain the amount, if any, of backpay due under the terms of this Recommended Order.

(d) Post at its plant at Point Pleasant, West Virginia, copies of the attached notice marked "Appendix."[2] Copies of said notice, to be furnished by the

[2] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto

Regional Director for Region 9, after being signed by a duly authorized representative of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily displayed. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.[3]

It is further recommended that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

Dated at Washington, D.C.
October 23, 1970

/s/JAMES V. CONSTANTINE
James V. Constantine
Trial Examiner

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shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[3] In the event this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES

WE WILL NOT discourage membership in UPPER SOUTH DEPARTMENT, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, or any other labor organization, or discourage activities protected by the National Labor Relations Act, by suspending or discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

WE WILL NOT refuse any employee permission to be represented by a labor organization at any meeting we hold with the employee for the purpose of questioning such employee about his alleged misconduct in the course of his duties.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the above Act.

WE WILL offer Catherine King, Delila Mulford, and Martha J. Cochran each immediate and full reinstatement to her former position, or if such position no longer exists, to a substantially equivalent one, without prejudice to their seniority and other rights and privileges enjoyed by each, and make each whole for any loss of pay she may have suffered, with interest at the rate of 6 percent, by reason of her discharge (including also suspension of Mulford and Cochran).

WE WILL notify said Catherine King, Delila Mulford, and Martha J. Cochran, if presently serving in the Armed Forces of the United States, each of her right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Serv-

ice Act of 1948, as amended, after discharge from the Armed Forces.

All our employees are free to become, remain, or refuse to become or remain, members of said UPPER SOUTH DEPARTMENT, or any other labor organization.

QUALITY MANUFACTURING COMPANY
(Employer

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 513—684-3686).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-1663

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
versus

QUALITY MANUFACTURING COMPANY, *Respondent.*

On Application for Enforcement of an Order of the National Labor Relations Board

Argued December 6, 1972. Decided July 19, 1973

Before Boreman, Senior Circuit Judge, Russell and Field, Circuit Judges

Stanley J. Brown, Attorney, National Labor Relations Board, (Peter G. Nash, General Counsel, Patrick Hardin, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel and William F. Wachter, Attorney,

National Labor Relations Board, on brief) for Petitioner; Bernard P. Jeweler (Bernard W. Rubenstein, and Edelman, Levy and Rubenstein on brief) for Intervenor; John E. Jenkins, Jr., (Jenkins, Schaub and Fenstermaker on brief) for Respondent.

BOREMAN, Senior Circuit Judge:

This case is before the court on the application of the National Labor Relations Board for enforcement of its order, issued on January 28, 1972, against the Quality Manufacturing Company (hereinafter "Quality" or "the Company"). The Board's decision and order are reported at 195 N.L.R.B. No. 42.

The Company's owners and principal officers are Lawrence Gerlach, Sr., president; his wife, Mary Kathryn Gerlach, production manager; and their son, Lawrence Gerlach, Jr., general manager. The Upper South Department, International Ladies' Garment Workers' Union, has been certified as the collective bargaining representative of the Company's employees in an appropriate unit since 1968. The Union's chairlady, or steward, who represented the employees in disputes with management under the collective bargaining agreement was, at all times pertinent to this case, Delila Mulford.

On the morning of October 10, 1969, Mulford and three other employees met with all three Gerlachs, during which meeting the employees complained that they could not make a satisfactory wage under the piece work system then in effect. One of those so complaining was Catherine King, a long-time employee. The discussion ended with Gerlach, Jr., ordering Mulford to return to her work station and telling her "if [the employees] didn't like the way it was there in the company to go elsewhere."

Later that same day, Mrs. Gerlach noticed that King had shut down her machine and was waving her arms, gestur-

ing, and causing some minor disturbance. Two other employees had stopped their machines and were watching King. Mrs. Gerlach directed her to resume production, but King told her to "tend to your business," whereupon Mrs. Gerlach ordered King to go to Mr. Gerlach's office. Upon King's request, Mulford left her own work station and accompanied King to the anteroom of Mr. Gerlach's office despite Mrs. Gerlach's warning to Mulford that she "had no business down there." When Mrs. Gerlach informed her husband of what had transpired he told Mulford to return to her work station because "it wasn't a grievance and [they] didn't have any business with her," but Mulford refused. He then ordered King to come into his office for a discussion but King replied that she would not go without Mulford. Mr. Gerlach then told both King and Mulford to return to their work stations, and they did so. On Sunday, October 12, Mr. Gerlach telephoned Mulford and informed her that she was suspended for two days. No reason for the suspension was given but, according to Mulford, she thought it was because of her conduct in seeking to represent King on October 10 in Mr. Gerlach's office.

On Monday, October 13, King found upon reporting for work that her timecard was not in the rack, which indicated under plant practice that she was wanted in Mr. Gerlach's office. This time King asked Martha Cochran, the assistant chairlady to accompany and represent her. Cochran accompanied King without first "punching in" or her own time card. They met Mrs. Gerlach outside the office and she warned Cochran that "your timecard is upstairs and my advice to you is to go on upstairs and go to work if you want your job." Mrs. Gerlach added that they (the Gerlachs) wanted to talk only to King and "take up where we left off Friday." Cochran replied, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is Union business and she has asked me to represent her," stating that she was a union steward and that was her duty.

Cochran and King then spoke to Mr. Gerlach and asked him if he was going to give King her timecard. He said that he would not until she came into his office and talked to him in private. Cochran and King sat and waited in or near the office for the remainder of that day. In the meantime, Cochran's timecard was also "pulled" from the rack.

On Tuesday morning, October 14, Cochran and King again went to Mr. Gerlach's office and asked Mr. Gerlach if he was going to return King's timecard. Gerlach again replied that he would not until King talked to him in private. Cochran asked about her own card and was informed that she had been suspended for two days for being away from her work station the prior day. King and Cochran then left the plant.

The next day, Wednesday, October 15, Mulford's suspension had ended and she returned to Mr. Gerlach's office along with Cochran and King. Mulford inquired as to the status of Cochran and King and was told that Cochran was under suspension and that King was wanted in Mr. Gerlach's office alone. Mulford then returned to work and Cochran and King left the plant.

On Thursday, October 16, Cochran's suspension had expired. She, Mulford and King returned to Mr. Gerlach's office when they were met by Mr. and Mrs. Gerlach. Mrs. Gerlach gave Cochran her timecard and she went to work. Mrs. Gerlach then told King that Mr. Gerlach wanted to see her in the office alone. King asked, "With Delila [Mulford]?" Mr. Gerlach said, "No, not with Delila," and added that if King "went out the door she was finished." King left the plant. Mulford then asked if she should go to work and Mr. Gerlach replied, "You've abandoned your job. You're finished." Mulford left the premises.

That same day, October 16, Cochran went to the office of Gerlach, Jr., during the noon hour and sought to present written grievances on behalf of Mulford, King and herself.

Gerlach, Jr., told her he didn't have time to fool with them since he was leaving town, and refused to accept the grievances. Cochran laid them on his desk but he picked them up and threw them in the trash.

Gerlach, Jr., then walked into the work area, pulled Cochran's timecard, and told her, "You worked this morning, but you're not working this afternoon." Subsequently, Cochran went to the office of Mr. Gerlach and asked if she had been fired. He responded, "Just go home. You wanted to draw unemployment now go on and draw it." Cochran left the plant but telephoned the office later that afternoon and requested that Mr. Gerlach's secretary ask him if she was to report to work the next day. She was told, "He said no." She told the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran was never notified to come back to work.

The full Board held that the Company violated Section 8(a)(3) and (1) of the Act upon a finding that Cochran was discharged because she sought to engage in a protected union activity, i.e., filing grievances on behalf of herself, Mulford, and King. The record contains substantial evidence to support the Board's finding and its order with respect to Cochran's illegal *discharge* will be enforced.

The Board also found (member Kennedy dissenting) that the Company violated Section 8(a)(1) of the Act by discharging King because of her insistence on union representation when summoned to an interview at which she had "reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct," and by suspending and discharging chairlady Mulford and suspending assistant chairlady Cochran because they sought to represent her at such an interview. We hold that on the facts of this case King had no right to have a union representative present at the requested meetings with her employer, and deny enforcement of that portion of the Board's order.

In *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F.2d 607 (7 Cir. 1947), a female employee named Ford had engaged in a serious dispute with other employees. When several employees threatened to resign unless Ford was discharged, she was ordered to report to a supervisor's office to discuss the controversy. After Ford twice refused to attend unless accompanied by union representatives, she was discharged for insubordination, i.e., refusal to comply with the order of the supervisor. The Board found that her discharge was because of her insistence on her right to have the union represent her at the meeting and that such discharge was in violation of Section 8(a)(1) and (3) of the Act. The court rejected this determination, commenting (158 F.2d at 613):

> The Board in its brief states: "As the Board has pointed out the legality of Ford's dismissal turns upon the issue whether or not she was within her statutory right in insisting upon the presence of the Union committee when Strecker [the supervisor] ordered her to report to his office alone." A decision of this issue favorable to the Board would mean that any employee could with impunity refuse to comply with a direction by management and in effect abrogate a rule such as the one here involved. Assuming that an employee has a right to be represented by the union in the discussion or representation of a labor grievance with an employer, such a right does not exist in the instant case. This is so, in our view of the matter, because there is no basis for the contention that such a grievance was involved.

In *Dobbs Houses, Inc.*, 145 N.L.R.B. 1565 (1964), an employee was called in for an interview by her employer concerning reported misconduct. Her request that a union representative be present was denied, and at the conclusion of the interview she was discharged. In dismissing the complaint, the Board adopted the Trial Examiner's finding that

the company had not violated Section 8(a)(1) of the Act by refusing to permit the union representative to be present at the employee's termination interview. The Trial Examiner had stated:

> I fail to perceive anything in the Act which obligates an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or to otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. (145 N.L.R.B. 1571)

Similarly, in *Electric Motors and Specialties, Inc.*, 149 N.L.R.B. 1432 (1964), the Board adopted the Trial Examiner's conclusion that an employee who had been called in for a disciplinary interview (149 N.L.R.B. at 1440)

> . . . had not been called in connection with a pending grievance; her statutory and contract right to representation was inapplicable. The employee's right to representation *when she presents a grievance* is not violated when the employer calls her in for admonition or discipline. (Emphasis in original.)

In *Texaco, Inc., Houston Producing Div.*, 168 N.L.R.B. 361 (1967), an employee was seen carrying a can of kerosene owned by his employer off company property. He was suspended almost immediately. An investigatory interview was scheduled and he requested that a union representative be permitted to attend, which request was denied, but the employee was informed that there would be no interview if he insisted on union representation. The employee chose to proceed, admitted taking the kerosene, and received additional discipline. The trial examiner found no violation of Section 8(a)(5) of the Act since the interview did not involve adjustment of a grievance, no grievance having

yet arisen. The trial examiner found no violation of Section 8(a)(1) of the Act since the employee could have filed a formal grievance and thereby assured himself of union representation. The Board reversed. It found that the employer knew all the facts prior to the interview and that the interview was therefore not investigatory in nature but more concerned with providing a record which would support disciplinary action. It determined that, by such interview, the employer had unlawfully sought to deal directly with the employee on a matter affecting his terms and conditions of employment, and that such conduct "interfered with and restrained [the employee] in the exercise of his rights guaranteed by Section 7 of the Act," and "transgressed [the employer's] statutory obligation to bargain with the Union." The Board held that the employer's conduct violated Section (8)(1) and (5) of the Act. Enforcement of the Board's order was denied. *Texaco Inc., Houston Producing Division* v. *N.L.R.B.*, 408 F.2d 142 (5 Cir. 1969). The court stated (408 F.2d at 144, footnotes omitted):

> After a careful study of the record, we can find neither basis in fact nor in law for the Board's conclusion that a union representative should have been permitted to be present during the interview. The evidence is overwhelming that the interview was investigatory in nature and there is absolutely no evidence that the [employer] sought to deal with [the employee] about the *consequences* of his alleged misconduct. The function of the interview was to question [the employee], not to bargain with him.

In *Texaco, Inc., supra*, the court cited and discussed the Board's decisions in *Chevron Oil Co.*, 168 N.L.R.B. 574 (1967), and *Jacobe-Pearson Ford, Inc.*, 172 N.L.R.B. 594 (1968). Both these cases were decided by the Board subsequent to its decision in *Texaco, Inc., supra*, 168 N.L.R.B. 361 (1967). The court characterized them as proper recog-

nition "that an employee's right to union representation does not apply to all dealings with his employer which may eventually or ultimately affect the terms and conditions of his employment." 408 F.2d at 144. The court continued (408 F.2d at 144-145, footnote omitted):

> In *Chevron Oil Co.*, the Board held that the exclusion of union representation from an employer-employee interview was not unlawful. There, a foreman had reported that nine employees had walked off the job fifteen minutes early in defiance of his orders. The employer interviewed the employees prior to arriving at a decision on whether disciplinary action was warranted. The Board concluded that such a fact-finding meeting was merely an added effort on the employer's part to hear both sides of the story before reaching a decision, and pointed out that employees should not be shielded by a bargaining agent from company inquiries when management embarks upon an investigation to ascertain whether plant discipline has been breached. Likewise, in *Jacobe-Pearson Ford, Inc.*, the Board upheld the denial of requested union representation at a proposed meeting between an employer and his procrastinating employee finding that the meeting was called merely for the purpose of gathering information.
>
> The result reached in these two cases would appear equally appropriate in the case *sub judice*. The Board's reason for finding otherwise is not entirely clear. It attempts to explain away the inconsistency by pointing out that in neither *Chevron* nor *Jacobe-Pearson-Ford* had the employer committed himself to disciplinary action at the time of the interview. But as the Company urges in its brief and as it clearly appears from the record, the Company was not committed to disciplinary action. The foreman's [initial] suspension of [the employee] was conditional pending the outcome of an investigation and by no means *committed* the Company to a course of action. In any event, if an interview is truly investigatory, we see no reason why an employer's prior commitment to disciplinary action should necessarily transform it into a collective bargaining session requiring union representation.

After the court's decision in *Texaco, Inc., supra*, the Board decided at least three other cases involving similar denials of union representation. *Wald Manufacturing Co.*, 176 N.L.R.B. 839, 846 (1969), *aff'd* 426 F.2d 1328 (6th Cir. 1970); *Dayton Typographic Service*, 176 N.L.R.B. 357, 361 (1969); *Texaco, Inc., Los Angeles Sales Terminal*, 179 N.L.R.B. 976, 982 (1969). Complaints which included allegations that such denial of union representation violated the Act were dismissed in all three cases, the latter two involving allegations of Section 8(a)(1) violations. And, very recently, in *Illinois Bell Telephone Company*, 192 N.L.R.B. No. 138 (1971), a phone repairman was suspected of pilfering from a pay phone. He was interrogated, told the money was marked, and made to put the money from his pockets under a fluorescent light. Thereafter, he was interrogated again and his request for union representation was denied. Still later, he was told again the money had been marked and that the interrogator suspected him of having that money. Then the employee's money was again fluoroscoped and he was told that money was marked. The employee was then asked to sign a statement, and the employee again asked for and was denied union representation. Later that day, the employee was suspended. The trial examiner's conclusion adopted by the Board was that at the time of these interrogations no discipline had been decided upon and the interrogation was fact-finding in nature, and that neither Section 8(a)(1) nor (5) of the Act had been violated because "the case law seems clear that the Act exacts no obligation upon the Company to accord the employee the right to union representation at that level of discussion." 192 N.L.R.B. at—.

The Board's holding that Quality violated Section 8(a)(1) of the Act by discharging King and by suspending and discharging Mulford and suspending Cochran cannot be sustained unless it may be said that King had a right to union representation at the interviews with her employer. In determining that such a right existed here for the reason that King had "reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct," the Board departed from existing case law as set out above.[1] The Board took notice of what

[1] Subsequent to its decision in the instant case the Board decided Mobil Oil Corporation, 196 NLRB No. 144 (1972), in which the Board rejected a contention that employees suspected of the theft of their employer's property were not entitled to representation during investigative interviews. The reasoning in *Mobil Oil* was similar to that upon which the decision here was premised. Member Kennedy dissented in *Mobil Oil* as he did in this case. The Board stated (196 NLRB at ——):

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at *an interview which may put his job security in jeopardy*. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action. (Emphasis added.)

That case is now pending in the Seventh Circuit, docket Nos. 72-1415 and 1538, upon the Board's application for enforcement.

There is, of course, no doubt that employees have a right to union representation at interviews with the employer after a grievance has been filed. The issue here is whether that right may be extended under the Act to require employers to permit an

it called the "*Texaco* line of cases,"[2] but determined that they were distinguishable since:

> [N]one of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview. In fact, the section 7 right of individual employees to act in concert "for mutual aid and protection" was not directly considered in those cases. Rather those cases involved a determination of whether the right of the union to bargain collectively was such that an employer could not legally deny its request to participate in the interview. (195 NLRB at—.)

It is our conclusion that the Board's attempt to distinguish these prior cases cannot be sustained.

Every situation wherein an employee is directed by management to cooperate in an investigatory interview carries the implicit threat of discipline if such direction is not obeyed. And the statement that a particular Section 7 right mentioned in the above quotation had not been previously considered is inaccurate when examined in the context of the case before us. As illustrated by the cases cited in this opinion, the Board has many times been confronted with an al-

employee to have union representation at interviews hitherto not included within its scope, *i.e.*, whenever the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation.

[2] *Texaco, Inc., Houston Producing Div., supra*, 168 NLRB 361, enforcement denied, 408 F. 2d 142; Chevron Oil Co., *supra*, 168 NLRB 574; Jacobe-Pearson Ford, Inc., *supra*, 172 NLRB 594; Texaco, Inc., Los Angeles Sales Terminal, *supra*, 179 NLRB 976. In its brief to this court, the Board adds to the list of *Texaco* progeny, Wald Manufacturing Co., *supra*, 176 NLRB 839, *aff'd* 426 F. 2d 1328; Dayton Typographic Service, Inc., *supra*, 176 NLRB 357; Illinois Bell Telephone Co., *supra*, 192 NLRB No. 138; Lafayette Radio Electronics Corp., 194 NLRB No. 77 (1971).

leged violation of Section 8(a)(1) in the context of a denial of union representation at employer-employee interviews. By necessary implication, Section 7 rights have been at issue in each of these cases.[3] Yet never has it been thought, as the Board would hold here, that such rights require an employer to permit an employee to have a union representative present whenever the employee "has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions."

In support of its new theory as to the meaning and application of the Act, and the extent of employees' rights thereunder, the Board offers essentially the following statement: "After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action." 195 NLRB at —. The Board cited no supporting legislative history in its opinion nor does it offer any in brief or on argument to this court. It presents no persuasive analysis of the statutory provisions. It only adopted what "seems to us [the Board] to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses." 195 NLRB —.

It is clear beyond question, however, that the Board has no power to alter or rearrange employer-employee relations to suit its every whim. Rather, the Board can only determine whether the Act has been violated. And it would appear that in the entire history of the law as developed above,

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[3] Section 7 of the Act, 29 U.S.C. § 157, gives employees "the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

the management prerogative of conducting an investigatory interview such as Quality attempted here has not been considered a violation of the Act. The language in the concurring opinion of Justices Stewart, Douglas and Harlan in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 225-26 (1964), is apt:

> "It is possible that . . . Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

For the above-stated reasons, enforcement of the Board's order insofar as it pertains to the discharge of King and Mulford and the suspensions of Mulford and Cochran is denied.

Enforcement granted in part and denied in part.

Filed July 19, 1973

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1663

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

QUALITY MANUFACTURING COMPANY, *Respondent*.

On Application for Enforcement of an Order of the National Labor Relations Board

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of an order issued by it against Respondent, Quality Manufacturing Company, its officers, agents, successors, and assigns, on the 28th day of January, 1972, in proceedings before the said Board known upon its records as Case No. 9-CA-5576; upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and it is hereby, enforced with respect to Cochran's illegal discharge, and denied insofar as it pertains to the discharge of King and Mulford and the suspensions of Mulford and Cochran, in accordance with the opinion of this Court filed herewith.

WILLIAM K. SLATE, II
Clerk

(Seal)

A True Copy, Teste:

WILLIAM K. SLATE, II, Clerk
By VIRGINIA LIPFORD
Deputy Clerk